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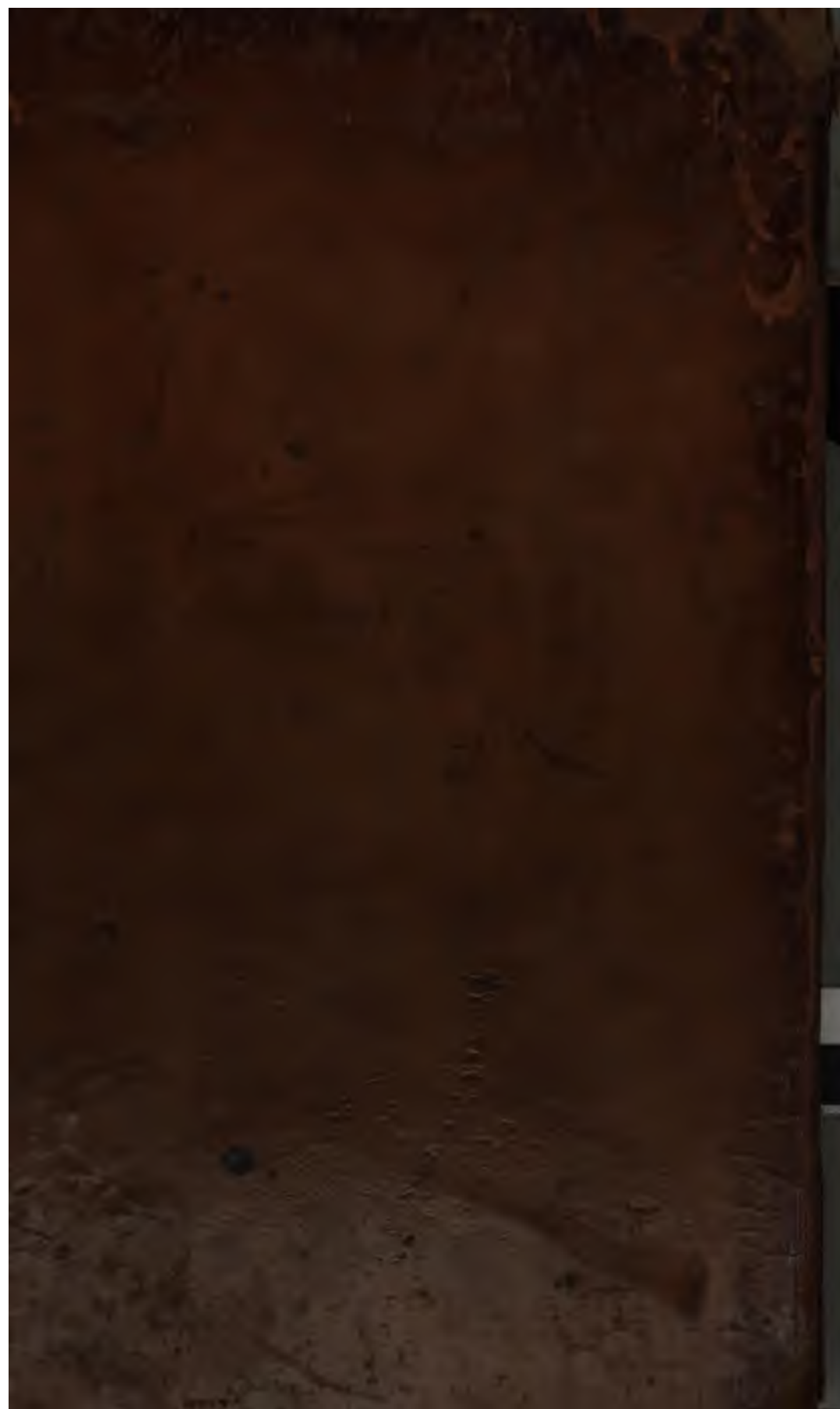
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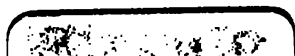
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*Mr. Justice Kekewich.*

**R E P O R T S**  
OF  
**C A S E S**  
IN THE  
**High Court of Chancery,**  
FROM 1757 TO 1766.  
FROM THE  
ORIGINAL MANUSCRIPTS  
OF  
LORD CHANCELLOR NORTHINGTON.  
COLLECTED AND ARRANGED,  
BY THE  
HONOURABLE ROBERT HENLEY EDEN,  
ONE OF THE MASTERS IN CHANCERY.

---

SECOND EDITION,  
WITH CONSIDERABLE ADDITIONS.

---

IN TWO VOLUMES.  
VOL. II.

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Me non accipere modo hæc a Majoribus voluit, sed etiam Posteris proderc.

---

LONDON:  
JOSEPH BUTTERWORTH AND SON,  
43, FLEET STREET.  
1827.

G. WOODFALL, ANGEL COURT, GRINER STREET, LONDON.



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## **MASTERS OF THE ROLLS.**

**SIR THOMAS CLARKE.**

**SIR THOMAS SEWELL**, *Dec. 4, 1764.*

## **ATTORNEYS GENERAL.**

**SIR CHARLES PRATT.**

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**SIR FLETCHER NORTON**, *Dec. 16, 1763.*

**THE HONOURABLE CHARLES YORKE**, *Aug. 25, 1765.*

## **SOLICITORS GENERAL.**

**THE HONOURABLE CHARLES YORKE.**

**FLETCHER NORTON, ESQ.** *Dec. 14, 1761.*

**WILLIAM DE GREY, ESQ.** *Nov. 1763.*





# REPORTS OF CASES

ARGUED AND DETERMINED

IN THE

## Court of Chancery.

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On *Friday*, the 16th of *January*, 1761, the Lord Keeper delivered the Great Seal to his Majesty in Council, and received it back with the title of Lord Chancellor.

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LE ROUSSEAU v. REDE.

(*Reg. Lib. B. 1760, fol. 129.*)

1761.  
21st & 23d Feb.  
S. C.  
Amb. MSS.

**WILLIAM RANDALL**, by indenture, bearing date the 23d of *June*, 1713, made between the said *William Randall* and *Susan* his wife of the one part, and two trustees of the other part, reciting that the said *William Randall* was possessed of or entitled to certain annuities therein particularly mentioned, in consideration of natural love and affection to his wife, *Susan Randall*, assigned the same to trustees, to hold in trust, and to the intent and purpose that they should suffer and permit him to take and

Settlement after marriage of stock which had been the wife's property, in trust for the husband for life, then to the wife for life, and then to the heir male of the body of husband and wife, in default of such heir male, to the heirs female, &c.

with a clause that, if the husband should settle lands of equal value to the like uses, the stock should be re-assigned to him; a son being afterwards born, who died in the lifetime of the father, without issue, and under age: held, that the property vested in the father, and passed by his will.

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receive to his own use the said annuities, or yearly payments for his life, and after his death in trust to permit his said wife to receive the same during her life, and after the decease of the survivor, to permit the *heir male* of their body (in the singular number) (a), to receive the same during the residue of the said term, and for default of such issue, to permit the heirs female of their bodies to receive the same during the residue of the said term; in default of such issue, then to the right heirs of the said *William Randall*. The settlement contained a proviso that, in case the said *William Randall* should settle lands of inheritance, of equal value, to the same uses, then the said annuities should be reassured to him. *William Randall* had two children, *William*, who died an infant in his lifetime, and the defendant *Prisca*, who afterwards married *Cox*, by whom she had eight children.

By his will, bearing date the 21st of *April*, 1759, he directed all his real and personal estate to be converted into money, and divided between his eight grandchildren. He left one daughter, the said *Prisca Cox*, and the said eight grandchildren by her. It appeared that the two *Exchequer* annuities were part of the wife's fortune, and that the defendant, *Mrs. Cox*, had no provision unless she was entitled to the annuities under the settlement.

This bill was brought by some of the grandchildren, to carry the will into execution, &c. The daughter, *Prisca Cox*, by her answer, claimed to be entitled to the annuities under the settlement.

The *Attorney-General*, and Mr. *Perrot*, for the plaintiffs, contended, that the limitation in the settlement to the *heir male* of the body of the husband and wife, in the singular number, is the same as if it had been to the *heirs male*, in the plural: and being of a chattel, gives

(a) This is not noticed in the Register's book.

the absolute right to the husband, and consequently, that the annuity became part of his personal estate, and passed as such by his will. That this was not the case of a will, nor of an executory trust, but of a deed the trusts of which are completely executed and declared by the deed. *Webb v. Webb*, 2 Vern. 668, 1 P. W. 132, *Garth v. Baldwin* (a).

The *Solicitor-General*, and Mr. *Wilbraham*, for the defendant, Mrs. *Cox*, contended, that the words *heir male* ought to be considered as words of purchase, being a contingent limitation to the heirs male or female, to take place upon the death of the father, in such of them as should be then living, like the case of *Stanley v. Leigh*, 2 P. W. 686, that if there should be sons living at his death, to such sons; if none, then to the daughter and daughters which should be then living. That as it was part of the wife's fortune, the settlement was in the nature of a contract, in which the wife must be supposed to stipulate for her children, and not to intend an absolute right to her husband after her death. That the only way to secure it to her children, is by making them purchasers: that it was the case of a trust, to be construed more liberally than a legal estate, in which the court will regard the intention, and mould it in such a manner that the father should have the profit of the annuity only for his life, *Peacock v. Spooner*; 2 Vern. 195. *Dafforne v. Goodman*, *ib.* 362. *Bagshaw v. Spencer* (b).

*The Lord Chancellor.*

The question now is, whether the interest in these annuities vests in Mrs. *Cox*, or in the grandchildren, on supposition that, by virtue of the limitations in the deed,

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(a) 2 Ves. 646.

(b) 2 Atk. 570. 1 Ves. 142. 1 Collect. Jurid. 378.

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the testator had the absolute interest in these annuities, subject to the wife's interest for life.

For the grandchildren it is insisted, by the answer, that if this had been an estate in lands, the limitation to the heirs male and the heirs female would have been words of limitation, and created an estate tail, and that the words creating a limitation in tail in an inheritance, will give the absolute interest in a chattel real or personal, and therefore, that the annuities are part of his personal estate, and pass under the will.

It is contended, 2dly, That, supposing this not to be the case; yet, that the limitation to the heir male as a purchaser, and the remainder on default of such issue, would be the limitation of an absolute interest to the son, and he dying in his father's life, the interest would vest in the father, transmissible to his representative.

The first proposition is, and must be admitted to be the general rule: but it is said, *exceptio probat regulam*, and that this rule is liable to three exceptions. 1st. To any case, where, from the intent of the testator appearing on the instrument, the word is intended as a word of purchase. 2dly. Where by the instrument the first estate is apparently intended to be an estate for life only, and the disposition over contingent. 3dly. Where the trust is executory, and the court has a power to model it.

For this purpose the defendants lay great stress upon the covenant of redemption of the annuities, by settlement of an estate to the same uses.

It is the fate of all courts of justice upon wills, it is the peculiar destiny of this court in contracts, wills, and trusts, to be the authorized interpreters of nonsense, and to find the meaning of persons that had no meaning at all,

— *Ex fumo dare lucem,*  
 — *ut speciosa dehinc miracula promat.*

A creative power is required to bring light out of darkness, and sound or specious determinations from unintelligible instruments. Civil polity, however, requires that there must be some supreme seer who is finally to arbitrate all disputes with certain justice and unquestionable satisfaction. Thank God, it is not this court !

The rise of all these difficult questions seems to have been from the law, like all other sciences, using technical expressions not understood by the vulgar, and frequently as little by those they employ ; and as the genius of this country abhors, and ought to abhor, all arbitrary determinations on right and property, the ablest and greatest judges successively seem to have laboured to bring these cases, primarily anomalous, to some rule, or analogy of rule ; and indeed the exceptions have not been properly such, (that is, not simple exceptions,) but rather an arrangement of cases excepted under another and stronger legal rule, *the intent of the testator*. This is the capital rule to which the counsel on both sides have appealed.

The rule, therefore, of my decision must be, what the testator intended according to his expressions in this deed. In the first place, I must consider it as a voluntary deed throughout ; the covenant at the end, as much so as the limitations in the body of it. 2dly, I must consider it as a settlement of the wife's fortune for the provision of herself, and some issue of the marriage. And 3dly, when I view it in these lights, I cannot possibly see a rational intent: as it was, in the sense of the counsel on both sides, a provision for one issue in prejudice of all the rest.

It is certain, that if this be considered as a money provision for a family, the common intent and the natural intent would have been, a limitation after the death of the husband and wife to the children equally ; and yet, that is inconsistent with the plain declaration of the party;

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for Mr. *Attorney-General* insists, that it is an absolute limitation to the father, subject to the wife's particular interest therein, or that it would have been absolute in the son on account of the remote remainder. And Mr. *Solicitor* insisted that it was contingent until the death of the father, and on his death would have absolutely vested in the heir male or female of his body then in *esse*.

The three cases that were cited to prove that from the intent of the testator the estate might be narrowed to an estate for life, and operate by way of contingent remainder, are cases of wills where the intent is both law and equity, and where the indicative words tie up the contingency to the death of the first taker; but this is the case of a deed, in which the court has no liberty, and cannot alter the intent, because it is odd and absurd. I take it to be clear, that these annuities were part of the wife's fortune, and that it was not intended that the eldest son should run away with the whole from the rest of the children; and therefore that the word *heir-male* must be construed *heirs male*. The rule of law in case of such a limitation of personal estate in a deed, gives the whole property to the first taker.

But it is said that this is a trust, and therefore executory, and that, as such, I may model it according to what I judge to be the intent of the parties. But I am of opinion that there is no such rule as that, except in cases of imperfect trusts, and where the aid of the court is called for to effectuate them. And therefore I think that Lord *Hardwicke's* determination in *Bagshaw v. Spencer* was as right, sound, and certain, as his different determination was in *Garth v. Baldwin* (a). In *Bagshaw v. Spencer* he collected the intention from very strong expressions in the will. In *Garth v. Baldwin* the trusts

(a) *Vide Wright v. Pearson, ante, Vol. I. p. 119.*

were completely directed, and therefore he allowed the words to have their legal operation. In the present case the trust is completely declared.

Suppose the husband, under the power in the settlement, had purchased land, and it had come before me upon his application to have the annuity re-assigned upon settling the land. I think that I ought to have directed the land to be settled upon the husband and wife for their lives, with remainder to their first and other sons in tail; with remainder to the daughters, and not to have made the estate of the children contingent till the death of the father and mother. In that case the son would have taken an estate tail in remainder in the lands in the lifetime of his father and mother. In the case of a chattel upon such a limitation, the whole would have vested in the son in the lifetime of his father and mother, and gone to his personal representatives, according to *Pelham v. Gregory* (a) in *Dom. Proc.*, with which determination I am well satisfied. The intention of the deed is clear, that the person to whom the inheritance was limited, should have an immediate estate on his coming in *esse*.

Declare, that the annuities vested in the testator, and are transmissible to his representatives (b).

(a) *Ante*, Vol. I. p. 518. *rick, ante*, Vol. I. p. 77, and

(b) See the next case, and the cases cited in the note to also *Cholmondeley v. Mey-* it.

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17th May, 1760.  
5th & 6th March,  
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ROOKE v. ROOKE.

(Reg. Lib. B. 1760. fol. 161.)

Covenant in marriage articles, that in case the father should happen to die leaving issue male, and one or more younger son or daughter, to raise portions; if but one then living 1000*l.*, if two 1200*l.*, if three 1500*l.*, to be paid at their respective ages of twenty-one, or marriage, in such proportions as the survivors of the father and mother should direct, in default of such direction, equally: held, that the share of a son who attained twenty-one was vested though he died in the father's lifetime.

GEORGE ROOKE, the plaintiff's father, upon his marriage with *Elizabeth Stevens*, the plaintiff's mother, by articles, dated 6th *September*, 1723, in consideration of the marriage, and marriage portion, covenanted to settle certain lands therein mentioned upon trustees to the use of himself for life, and after his death, to the use of the heirs male of the body of him and the said *Elizabeth*; and for want of such issue, to the use of the heirs female of the body of him and the said *Elizabeth*; and for want of such issue, to the use of the survivor of the husband and wife, and the heirs and assigns of such survivor; and if there should be any issue male or female, then the lands to stand charged with £100 a year for the use of the wife during her life. And it was agreed, that in the settlement to be made, there should be a provision in case the said *George Rooke* should happen to die, leaving issue male, and one or more younger son or daughter of the marriage, that then the trustees should, by rents and profits, or mortgage of the lands, raise portions and provisions for such younger children; that is to say, if but one then living, the sum of £1000; if two, the sum of £1200; or if three or more, then £1500, to be paid to such younger children at their respective ages of twenty-one, or marriage, in such proportions as the survivor of the father or mother should direct; for want of such direction, share and share alike.

The marriage took effect, and there was issue four sons, viz. *George*, the plaintiff, and three younger sons, *Nicholas*, *Richard*, and *Henry*, who all survived the

mother ; but *Henry* died in his father's lifetime. The father died in *June*, 1758, and having a daughter, *Elizabeth*, by a second marriage, by his will, dated 4th *March*, 1758, after certain legacies, gave all the residue of his estates, real and personal, to this daughter, her heirs, executors, and administrators.

It appeared that the father in his lifetime, by indentures of lease and release of 3d and 4th *February*, 1734, had settled the premises to the use of himself for life, and after his death for securing the £100 a year to his wife for her life, subject thereto to the use of the plaintiff, his eldest son, for life ; remainder to trustees to preserve contingent remainders ; remainder to the first and other sons of the plaintiff in tail male, with like remainders successively to the other sons, with remainder in fee to the survivor of the father and mother ; and a term was created, to take effect upon the death of the father, for 100 years, for raising the portions of the younger children according to the articles.

The plaintiff, *George*, the eldest son, filed the present bill, thinking himself aggrieved by the settlement of 1734, he being thereby made tenant for life only, whereas, according to the articles, he ought to be tenant in tail. He complained likewise of the settlement of 1734, it being thereby provided that £1500 should be raised for the portions of the younger children, whereas, at the death of the father, there were only two younger sons, *Henry* having died before the father ; and he therefore insisted that the estate ought to be charged with £1200 only, according to the articles, and not with £1500.

The bill prayed that the settlement of 1734 might be set aside, and that a proper settlement might be made, pursuant to the articles. *Richard* and *Nicholas Rooke*, the two surviving younger brothers, the trustees, and

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*Elisabeth*, the daughter and devisee of the father, were the defendants.

The cause came on to be heard 17th *May*, 1760, when it was decreed that the settlement of 1734 should be delivered up to be cancelled, and that the articles of 6th *September*, 1723, should be carried into execution ; and it was referred to a Master to see a new settlement made pursuant to the articles, as far as the circumstances of things then existing, and the deaths of the parties to, or claiming under the articles, would admit ; and all proper parties were to join in such settlement as the Master should direct. And it was ordered that the Master should inquire whether *Henry Rooke*, the son, had attained his age of twenty-one years before he died, and whether he died leaving issue, or having made a will, and the Master was to make a separate report thereof.

The Master certified that *Henry*, the son, lived to attain his age of twenty-one years ; that he died unmarried, and without issue, having made his will, dated 25th *January*, 1756, whereby he bequeathed to *George Rooke* his father, all his goods and chattels, debts and credits, and made him his executor ; and that *George*, the father, had, in his lifetime, proved the will.

Upon this report the cause was now brought on for further directions, and the only question was, whether *Henry*, the son, ought to be considered as having any vested portion under the marriage articles, he having died in the lifetime of the father ; and, consequently, whether the defendant, *Elisabeth*, under the will of *Henry*, the son, and *George*, the father, was entitled to claim such portion ; and whether £1500 or £1200 should be raised upon the estate.

The *Attorney-General*, and Mr. *Wilbraham*, for the plaintiff.

Nothing is more uncertain than the rules about vesting portions; in the present case it is plain, from the words, that no portion was intended but for such younger children only as should be *living at the death of the father*; it is a question merely of construction upon the deed, the intention must be picked out from the words; there was plainly no time when *Henry*, the deceased son, could say he was entitled to any thing, by reason of the power in the survivor of the father and mother to fix the *quantum* of the portion of each younger child; it is besides an unnatural claim in the father, to say he is entitled to his child's portion under his own marriage articles; it has rather been a rule of this court not to favour any claim of portions not wanted as such, and therefore not to decree them as transmissible interests, unless they appear clearly to be vested rights.

The *Lord Chancellor* here said, that he could not take notice of any thing that had happened subsequent to the articles, so as to vary the right as it stands upon the articles; and that though there is some prejudice in a father's claim, yet that would be otherwise, though the right the same, in the case of children or creditors of the deceased son.

The *Solicitor-General*, Mr. *Sewell*, Mr. *Comyn*, and Mr. *Coxe*, for the defendant.

Though the strict letter seems strong to support what is contended for, yet it may be laid down as a general principle, that in marriage articles, which are to be carried into execution by this court, the intent of the parties is to be pursued, and that the words shall give way to the intent, and not the intent to the words. *West v. Erissey*, 2 P. W. 349. Com. Rep. 412. *Uvedale v. Halfpenny*, 2 P. W. 151.

Now it cannot be doubted in the present case, but that it was the intent and meaning of the articles in question, that every child of the marriage should have a provision

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under the articles ; and the late case of *Cholmondeley v. Meyrick* (a), is a sufficient authority to shew, that the power of the father of apportioning the provision, shall not prevent the portion from vesting ; the case of *Corbet v. Maidwell*, 1 *Salk.* 159. does not clash with this, that case being upon a provision in the alternative. *Earl of Salisbury v. Lambe* (b).

The court will presume such portions as may be useful. If they could not be raised during the life of the father, yet being vested, the future certain interest might advance a daughter in marriage, or give credit to a son, and would therefore answer an immediate interest. Supposing the son had left children, it would be a most unnatural construction to say that nothing vested in the father which they could claim ; the court has never dealt so hardly with children as this. *Attorney-General v. Sutton*, 1 *P. W.* 754.

But the words, “ If the father should die, leaving younger children, to pay to such younger children then living,” imply no more than that their portions should not be raised in the lifetime of the father ; and might be thrown in to prevent a sale of the reversion in the lifetime of the father ; and it does not imply the negative that the portions should not vest till the death of the father. *Pitfield's case*, 2 *P. W.* 513.

And the present case is not like *Brome v. Berkley* (c), where the maintenance was not to commence till after the term came in possession, and the portion could not be said to precede the maintenance.

*The Lord CHANCELLOR.*

This bill is brought by the plaintiff as eldest son of the marriage, and very properly, to have the settlement of 1734 set aside, and that the marriage articles of 1723

(a) *Ante*, Vol. I. p. 77.

(b) *Ante*, Vol. I. p. 465.

(c) 2 *P. W.* 484.

may be carried into execution under the decree of the court, and this has already been determined in favour of the plaintiff; but on behalf of the father it has been insisted, that as he stood in the place of *Henry*, one of the sons, who died in the lifetime of the father, and he having made a will, and appointed the father executor, that what passed to the father by that will became transmissible, and passed by the will of the father to the defendant, *Elizabeth*; and upon this an inquiry was sent to the Master, whether *Henry*, the son, had attained the age of twenty-one before his death; whether he died without issue; and whether he made any and what will. And the Master has reported that this *Henry*, the son, lived to attain his age of twenty-one years; and that afterwards, in *September*, 1756, he died unmarried and without issue; and that before his death he made his will, dated 25th *January*, 1756, whereby he bequeathed all his goods and chattels to his father, and appointed him his executor. And upon this report, the question that materially concerns the parties is, how the court shall declare the trusts for the portions of the younger children pursuant to the articles.

It has been contended for the father, in order to make the argument operate against him, that he had a total control over the portions, to appoint them amongst the younger children as he should think fit, and therefore that nothing vested in them; and that there was no time when any younger child could say what he was entitled to by the articles, and therefore nothing vested. All parties, however, concur in this, that the intention of the articles was to provide portions for the younger children: it would therefore be to tie up the vesting to say that all depended upon the death of the father. I think it the strongest case I ever saw in my life, to say, upon the foot of the intention, that the portions were vested.

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It is a principle strongly recognized in this court, that marriage articles are to be carried into execution by men of skill, according to the intention of the parties, and not from misapprehended terms and expressions used by the parties; and it is most reasonable to say, that when a trust is to be modelled and executed by this court, it should be done according to what appears to have been the original intention: and the cases which have been mentioned to this purpose are strongly in point, and so was the late case of *Bagshaw v. Spencer* (a).

It is plain that the settlement was to be a provision for the wife and children, which manifestly indicates an intention that the portions should be vested interests; and it seems to me inconsistent with true grammar, common sense, and sound learning, and the *jus et norma loquendi*, to give a construction to these articles that would tie up the vesting of the portions to the death of the father; and it seems to be nothing but the prejudice against a father's claim that has made this question. No conveyancer could have thought of making a settlement pursuant to these articles, without considering the portions intended as vested interests. The word *portion* makes the younger children purchasers as much as the eldest son.

Declare, therefore, that provisions should be made, under the trust in question, for raising the £1500 with interest from the death of the father; and that the share of *Henry*, the deceased son, was a vested interest, which now belongs to the defendant, *Elisabeth*; and let it be referred back to the Master to see the settlement prepared accordingly (b).

(a) 2 Atk. 570. 1 Ves. 142. 1 Coll. Jurid. 378.

(b) Vide *Cholmondeley v. Meyrick*, ante, Vol. I. p. 77, and the cases cited in the note.

RUMBOLL v. RUMBOLL.

(Reg. Lib. B. 1760. fol. 262.)

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Cit. 2 Cox. 96.  
Amb. MSS.

A GRANT was made, bearing date the 12th of *December*, 1715, of a copyhold estate, held of the manor of *Wootton-Bassett*, for three lives successively; viz. *Charles Rumboll*, and his two sons, *Jasper* and *Charles*. By the custom of the manor the person first named in the copy may dispose of the whole interest. *Charles Rumboll*, the father, paid the fine, and was admitted to the estate. On the marriage of the son, *Jasper*, with the defendant, *Mary*, *Charles Rumboll*, the father, settled a freehold estate on him and the issue of the marriage, and also gave him £400: in consideration of which, *Jasper*, and the defendant *Mary*, his intended wife, entered into a bond, dated the 28th of *November*, 1729, in the penalty of £1000, reciting that *Charles Rumboll*, the father, was entitled to the copyhold premises for his own life and the life of *Jasper*, and had made a settlement of freehold on their marriage; in consideration whereof *Jasper* had agreed that such person and persons should hold the copyhold premises during his life, and the widowhood of *Mary*, as the father should by writing or will appoint; and conditioned to permit such person and persons to enjoy the copyhold premises accordingly.

The father, being about to marry again, surrendered the premises, and on the 7th of *May*, 1731, received a new grant for three lives, viz. *Thomas*, his youngest son, who was first named, *Jasper*, and *Charles*, the second and third lives. *Charles Rumboll*, the father, was admitted,

Where a father and two sons, *A.* and *B.* were successive lives in a copyhold, where, by the custom, the person first named might dispose of the whole interest; and upon the marriage of *A.* it was agreed that the father should have power to appoint during the life of *A.* and the widowhood of his intended wife; the father having afterwards obtained a new grant for the lives of *C.* a third son, and *A.* and *B.*, by a will made after the death of *C.* in which no mention is made of the copyhold, gives the residue of his personal estate to *B.*: held, that *B.* was not thereby entitled to the copyhold.



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It is a principle strongly recognized in this court, that marriage articles are to be carried into execution by men of skill, according to the intention of the parties, and not from misapprehended terms and expressions used by the parties; and it is most reasonable to say, that when a trust is to be modelled and executed by this court, it should be done according to what appears to have been the original intention: and the cases which have been mentioned to this purpose are strongly in point, and so was the late case of *Bagshaw v. Spencer* (a).

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(a) 2 *Atk.* 570. 1 *Ves.* 142. 1 *Coll. Jurid.* 378.

(b) *Vide Cholmondeley v. Meyrick*, ante, Vol. I. p. 77, and the cases cited in the note.

RUMBOLL v. RUMBOLL.

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1761.  
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The father, being about to marry again, surrendered the premises, and on the 7th of *May*, 1731, received a new grant for three lives, viz. *Thomas*, his youngest son, who was first named, *Jasper*, and *Charles*, the second and third lives. *Charles Rumboll*, the father, was admitted,

Where a father and two sons, *A.* and *B.* were successive lives in a copyhold, where, by the custom, the person first named might dispose of the whole interest; and upon the marriage of *A.* it was agreed that the father should have power to appoint during the life of *A.* and the widowhood of his intended wife; the father having afterwards obtained a new grant for the lives of *C.* a third son, and *A.* and *B.*, by a will made after the death of *C.* in which no mention is made of the copyhold, gives the residue of his personal estate to *B.*: held, that *B.* was not thereby entitled to the copyhold.

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Here *Jasper* takes nothing by purchase, for the first taker has a right, by the custom, to dispose of the whole interest. The following lives do not take by purchase after the death of the first taker, when they come into possession, but they take in succession, according to the custom, in the nature of an inheritance. The sound essential description of an advancement is an estate taken by purchase, which, in the case of a stranger, would result. If in every case where children were named in the copy it was an advancement, persons would be under a necessity of putting in strangers, which might be inconvenient.

But it is not necessary to determine these points, for it turns on a question arising on the marriage settlement: the bond is material. It is plain that the family considered the copyhold premises just as they were; and that on the death of the father a contingent interest would arise to *Jasper*, beneficially to himself. If they had thought that in case the father had not disposed of it, the estate would go to his executors, they would not have entered into this agreement, which, in such a case, is imperfect. The meaning of the agreement was, that the

out that purchaser; whether in one name or several; whether jointly or successive, results to the man who advances the purchase-money: that this resulting trust may be rebutted by circumstances in evidence: that the circumstance of one or more of the nominees being a *child* or *children* of the purchaser, is to operate by rebutting the resulting trust; and that such

circumstance shall do so as a *circumstance of evidence*. See also, *Glaister v. Hewer*, 8 Ves. 199. *Finch v. Finch*, 15 Ves. 43. *Prankerd v. Prankerd*, 1 S. and S. 1. To repel the presumption, evidence of the father's intention must be contemporaneous with the payment of the purchase-money. *Murless v. Franklin*, 1 Swa. 13.

father should have power to dispose of the estate to his last moment, which he apprehended he had not (though in that he was mistaken), and this was done to prevent the expence of changing the lives.

The question then is, what has the father disposed of? He has, by his will, given every species of land, but is totally silent as to the copyhold premises, and confines the residuary clause to personal estate and chattels personal. Nothing is so plain, as that words which are in themselves applicable to the ownership of an estate, do not operate as an execution of a power, unless something more is said.

By the subsequent transaction he makes use of the power, by surrendering the estate, and putting in the name of his son *Thomas*. He meant the copyhold should go to his son *Jasper* after the death of his son *Thomas* and therefore takes no notice of it in his will: this is the light in which it has been understood by the whole family.

Bill dismissed.

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BYDE v. BYDE.

(*Reg. Lib. A. 1760, fol. 495.*)

22d & 24th April,  
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S. C.  
1 Cor, 44.

RALPH SKYNNER BYDE, having issue by a former wife one son, *John Byde*, on whom his real estates were settled, upon his second marriage, by indenture of settlement, bearing date the 3d of *July*, 1699, in consideration of his marriage, and the marriage portion, settles other lands on himself and his wife *Sarah*, for their lives, and the life

*A.* upon his second marriage, settles land to raise 5000*l.* for the children of the marriage. Having four children by that marriage, he by his will, in

which he takes no notice of the settlement, gives 1000*l.* to each of them *as his and her portion*: held, that they were not entitled to portions under both instruments, and that as they had accepted the provision by the will, they were bound by such acceptance.

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of the survivor ; remainder to trustees, and their heirs, in trust, to sell the same to his son, *John Byde*, for £5000, for the provision and maintenance of such children as he should have by his second marriage, to be given and distributed to and amongst such child and children, some or any of them, as he and his wife should, by deed or writing, &c. appoint ; and in default of such appointment, to such children, equally to be divided between them, as tenants in common, if more than one ; if but one, then the whole to such only child, with remainder, in default of such issue, to his own right heirs. And if the said son should refuse to accept the lands at that price, or should be dead before the event happened, in trust to sell for the most money, and distribute the same in manner aforesaid.

*R. S. Byde*, having three children living by his second wife, who was pregnant, and being seised in fee of considerable freehold estates, by his will, dated 10th *July*, 1705, reciting, that his meaning was to provide for the maintenance of his said children, gave £1000 to each of his three children by name, as and for his and her portion respectively, and £1000 to such child as his wife should be enceinte with, to be paid at their respective ages of twenty-one years if males, if females at twenty-one years, or marriage, with interest at 4 *per cent.* for maintenance in the mean time. And if any should happen to die before, &c. the portion of such child or children to go to the survivor or survivors ; and if all the children of the second marriage should die, then to go to the said *John Byde*, the son of the first marriage ; and he charged all his lands whatsoever (of which he had any power to dispose) with payment, as well of his said portions as of his debts and legacies.

After the testator's death the said *John Byde* paid the £1000 portions, and gave notice to the trustees that he

accepted the purchase upon the terms of the settlement, and called upon them for a conveyance; but before any conveyance could be made he died, leaving the defendants, his cousins, his devisees and executors. The testator's widow died in 1755. The plaintiff, being the only surviving child of the second marriage, brought the bill to have the purchase completed, and to be satisfied the £5000 out of *John Byde's* assets over and above the portion she had received under the will. The only question was whether she was entitled to both, or only one of the provisions.

The *Attorney-General*, the *Solicitor-General*, and Mr. *Perrott*, for the plaintiff.

The gift by this will cannot be taken as a satisfaction of the settlement: the general rule of the court is, certainly, that where a portion is given by will by a parent to a child entitled to a similar provision under a settlement, the court presumes that the testator meant it as a satisfaction. There are so many cases about portions satisfied or increased, that it would be needless to run through them all. *Bloyes v. Bloyes*, cit. 2 *Vern.* 111. *Thomas v. Kemeyes*, ib. 348. *Savile v. Savile*, 16 *Vin. Ab.* 442. *Copley v. Copley*, 1 *P. W.* 147. *Grimes v. Allyn*, 1751. But in every one of the cases upon this subject, except the single one of *Jesson v. Jesson*, 2 *Vern.* 255. it has been held requisite that it should either be the same sum, or a greater. The inclination of the court against double portions has always been influenced by the apparent intention of the donor; for there is no doubt that if he intended a satisfaction, they must be bound, but such never could have been his intention in the present case. First, because the sum was not the same, but less; the issue of the second marriage being entitled to £5000 under the settlement, and to £4000 only by the will. Secondly, because it is not of the same

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nature: by the settlement they are made tenants in common, by the will the portions are to survive. Under the will by one contingency they might take the whole land; for in case of the heir's refusing to purchase, the issue of the second marriage would be entitled to the whole land.

The devise was made *diverso intuitu*, viz. for their provisions and maintenance during the life of the mother; because, under the settlement, the trustees could not raise the portions till after the mother's death. The court has never held that a less sum should go in satisfaction of any greater, because it would not preclude a testator from being bountiful as well as just.

Mr. *Sewell*, Mr. *de Grey*, and Mr. *Hoskins*, for the defendants.

This case is very different from all the cases of satisfactions between debtor and creditor, for there equity supposes the testator meant to satisfy, because it is natural every man should be just before he is generous; but the cases of children go upon another ground, because equity is averse to double portions, which would greatly incumber the inheritance, and therefore presumes, wherever a parent has given a child a portion, it was all he meant that child should take, unless there are circumstances; and wherever a child is entitled to a portion under a settlement, and a parent gives by will another, it is presumed to be in satisfaction, unless the contrary appears: as when lands at common law were given in frank-marriage, such child could not come in as a coparcener. And as to its being a less sum, that could be no objection; because a less sum raised at one time, might be more than equal to a larger at another; so in *Jesson v. Jesson*, there was no doubt of its being a satisfaction *pro tanto*; the only question was, whether it should not be taken as a satisfaction for the whole. Secondly, as to the testator's intention, which alone could over-rule this principle: it

is clear that he meant to give this £4000 in satisfaction of a settlement, that is as far as he could, by offering something conditional to them in lieu of their provision under the settlement. He has given this as a portion *eo nomine*, which they might, it is true, have rejected, and claimed under the settlement. But, in fact, the provision under the will was more beneficial, for that was present, and with interest in the mean time, until coming of age, by way of maintenance; whereas that under the settlement was future, and uncertain when it was to happen, being not raiseable till after the mother's death (who was young), and no interest in the mean time; and this was still more forcible in the present case, because the children had accepted the portion under the will upon coming of age.

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*The Lord CHANCELLOR.*

The bill is brought by the plaintiff to have her share of portions, which were to be raised under the deed of settlement of the 3d of July 1699, and her claim is founded on this: that the father meant to give the children of the second marriage portions, by his will, beyond and independent of what they might be entitled to under the settlement. There are two objections to their claim; the first is that of having a double portion; the second, which, I think, is very material, is, that they accepted the portions given under the will.

The plaintiffs have anticipated the first objection, by endeavouring to distinguish the present from the case of a double portion. They say, that a double portion must first be a legacy equal to the portion: secondly, equally beneficial: and thirdly, *ejusdem naturæ*, and certain: and it is true, that where the question arises upon a simple devise of a legacy of a sum to a child, without intimation of the amount and intended application of it, these are established rules; but I think they do not apply to the



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present, nor to any case wherein the intent of the testator is manifest (as I think it is here), and expressly declared in his will. For it is an everlasting maxim of law and equity, that every man may impose what terms he pleases on his gifts and legacies; therefore the question is primarily, what is the testator's intent?

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The case, in short, is no more than this: *R. S. Byde* settled lands on himself for life; remainder to his wife for life; remainder to trustees, and their heirs, in trust, after the death of the wife, to convey to *J. Byde*, his son and heir by a former wife, upon his paying £5000; and if he refused or neglected to purchase the same, then to sell for the most money, and distribute the same equally amongst the children of the second marriage for their provisions and maintenance, in case the father and mother had made no joint appointment in their lives. After this, without taking any notice of the settlement by his will, he gives £4000 to such children, £1000 to each of them *as his and her portion*.

It is insisted that I must construe this expression, not according to the entire idea which the word obviously conveys, and the grammatical sense of it, but that I must take it as additional, as a further portion, or part of portion. Now, with the utmost attention I have been able to give, I think I should do violence to the will if I were to put so narrow a construction upon the words. The whole "collocation" (as the grammarians call it) of the sentence indicates, that the testator meant to express one entire thing, viz. a portion, or full portion. The expression is perfectly and fitly adapted to a single idea: and as he knew there was a provision under the settlement, he could never express himself in words so entire in their meaning, if he had intended to give an additional portion. This seems to me an insurmountable reason, arising from the context of the will, to take it according

to the express sense of the words; and that his intention was, they should have their option to take it in lieu of the provision under the settlement.

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Why then, if this was his intent, the objections taken and arising from the inequality, from the sums not being equally beneficial or certain, are not for me to determine, for they have been determined already by the best judges, viz. by the parties themselves. For then the legacy is conditional, and the party accepting must be bound by his acceptance (a).

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If a man gives a curiosity of art, or a natural production, by way of satisfaction of a debt, or a portion, and the legatee accept it, though the value be less than the debt, there could be no ground for equity to interpose; for so, equity would control the natural power of one party to give, and the other to accept what is offered.

All the cases where the testator's meaning is not plain, are not applicable to the present. I am clear the testator's was disjunctive, and that he had not particularly in view either the £4000 or £5000, but meant to each child an election to accept or refuse such share or legacy under the will (b).

Bill dismissed.

(a) As to acceptance of conditional legacy, *vide* Vol. I. p. 489. 427. *Copley v. Copley*, 1 P. W. 147. *Brown v. Peck*, ante, Vol. I. 140. *Williams v.*

(b) For the doctrine upon the subject of presumption against double portions, whether in the case of Satisfaction by will of a portion previously secured by settlement, or of Ademption of a legacy by subsequent advancement, *vide* *Bellasis v. Uthwaite*, 1 Atk. 425. *Duke of Bolton*, 1 Dick. 405. *Warren v. Warren*, 1 Bro. C. C. 309, and the editor's note to it. *Jeacock v. Falconer*, *ib.* 294. *Grave v. Earl of Salisbury*, *ib.* 425. *Holmes v. Holmes*, *ib.* 555. *Debeze v. Mann*, 2 Bro. C. C. 165. *Ellison v. Cookson*, *ib.* 307.

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and 3 Bro. C. C. 61. *Hanbury v. Hanbury*, 2 Bro. C. C. 352. 529. *Powell v. Cleaver*, *ib.* 500. *Baugh v. Walker*, 3 Bro. C. C. 183. *Hinchcliffe v. Hinchcliffe*, 3 Ves. 516. *Sparks v. Cator*, *ib.* 530. *Freemantle v. Bankes*, 5 Ves. 79. *Trimmer v. Bayne*, 7 Ves. 508. *Twisden v. Twisden*, 9 Ves. 413. *Robinson v. Whitley*, *ib.* 577. *Bengough v. Walker*, 15 Ves. 507. *Hartopp v. Hartopp*, 17 Ves. 184. *Chave v. Farrant*, 18 Ves. 6. *Ex parte Pye*, *ib.* 140. *Monck v. Lord Monck*, 1 Ba. & Be. 298. *Dwyer v. Lyvagh*, 2 Ba. & Be. 156. These cases establish that where a parent gives a legacy to a child, not stating the purpose for which he gives it, he shall be considered as giving a *portion*,

and (upon a sort of artificial notion that the father is paying a debt of nature) if he afterwards advances a portion on the marriage of that child, it is a satisfaction of the whole or in part : whereas a *stranger* giving a legacy is understood as giving a bounty, not as paying a debt, and therefore must be proved to mean it as a portion or provision, either upon the face of the will, or by evidence applying directly to the gift proposed by the will.

As to the admission of parol evidence in these cases, *vide Powell v. Cleaver*, *Ellison v. Cookson*, and *Debeze v. Mann*, *cit. sup.* As to the application of the doctrine to natural children, *Grave v. Earl of Salisbury*, *cit. sup.*

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24th, 25th &amp;

26th May,

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Case, MSS.

## VERNEY v. EARL VERNEY.

(Reg. Lib. Min. Trin. 1761.)

Where portions were provided for daughters on failure of issue

male, to be paid at twenty-one, or marriage, after the death of the survivor of the father or mother; the father having died, and there being an only daughter, who had attained twenty-one; it was held, from the clear indication of the intention, to postpone the raising till after the death of the survivor, that the portion should not be raised during the lifetime of the mother.

THIS was a bill brought by Miss Verney, granddaughter and heir at law of *Ralph, Earl Verney*, de-

ceased; and only child of *John Verney*, eldest son of the said earl by *Mary Nicholson*; and it prayed (*int. alia*) to have the arrears of £400 *per annum* for maintenance from the death of her father, till her age of fifteen; of £700 *per annum* from her age of fifteen till twenty-one; and to have her portion of £20,000 raised with interest from that time; and it was brought against the defendant, the present Earl *Verney*, who was second son of the late Earl.

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On the marriage of the said *John Verney*, eldest son of the late Earl, then Lord *Fermanagh*, with *Mary Nicholson*, only daughter of *Joshua Nicholson*, esq. in consideration of £40,000, the marriage portion of the said *Mary Nicholson*, the said Lord *Fermanagh* settled certain premises on the said *Mary Nicholson*, to secure an annuity of £1600 *per annum* for her in case she should survive the said *John Verney*; and after a limitation, to the first and other sons in tail male, a term of 500 years was created to raise portions for daughters.

The trusts of the term were declared to be, in case there should be no son at the time of the death of the said *John Verney*, and there should be one or more daughter or daughters at the time of failure of issue male of the said *John Verney*; that then the said trustees, at the death of the survivor of the said *John Verney* and *Mary Nicholson*, should, by sale or mortgage of the said premises, or out of the rents and profits thereof, raise and levy the sum of £20,000 for the portions of such daughters; and if there should be but one such daughter, then that such only daughter should have the whole of the said £20,000 as and for her portion, to be paid her at the age of twenty-one, or marriage, after the decease of the survivor of the said *John Verney* and *Mary Nicholson*, and failure of issue male of the said marriage.

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Provided that in case any daughter should attain the

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age of twenty-one years, or be married during the lifetime of the said *John Verney* and *Mary Nicholson*, or the survivor of them, that then the said portion of such daughter should be paid within one year next after the decease of the said *John Verney* and *Mary Nicholson*.

Provided also, that no sale or mortgage of the said premises should be made by the said trustees until some one or other of the said portions should have so become payable as aforesaid. Provided also, that in case there should be no such daughter, or every such daughter should die before her portion should be so payable as aforesaid, then the said term should cease.

There was also a covenant that in case of there being only one such daughter, the said trustees, after the decease of the survivor of the said *John Verney* and *Mary Nicholson*, and failure of issue male, should raise, for the maintenance of such only daughter of the said marriage, the yearly sum of £400 for maintenance, until such daughter should attain her age of fifteen; and also the yearly sum of £700 for maintenance, until her said portion should so become payable as aforesaid; the said several sums for maintenance to be paid by half yearly payments at *Lady-day* and *Michaelmas*; the first payment to be made on such of the said days as should happen next after the decease of the survivor of the said *John Verney* and *Mary Nicholson*.

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There was a covenant on the part of Lord *Fermanagh* during the joint lives of himself and Mr. *Nicholson*, that he would contribute the sum of £200 *per annum* for the maintenance of the daughters.

The *Attorney-General*, the *Solicitor-General*, Mr. *Wilbraham*, Mr. *Coxe*, and Mr. *Barnard*, for the plaintiff, cited *Gerrard v. Gerrard*, 2 Vern. 458. *Corbet v. Maidwell*, ib. 655. *Brewen v. Brewen*, Prec. Can. 596. *Harvey v. Harvey*, 2 P. W. 21. *Pitfield's case*,

*ib.* 513. *Butler v. Duncombe*, 1 P. W. 448. *Staniforth v. Staniforth*, 2 Vern. 460. *Saville v. Savilla*, Sel. Ca. in Ch. 33. *Hebblethwaite v. Cartwright* (a). *Adams v. Horwood* (b). *Greenhill v. Waldoe*, Prec. Can. 367. *Cholmondeley v. Meyrick* (c).

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Mr. Sewell, Mr. Perrott, Mr. de Grey, and Mr. Wedderburne, for the defendants.

*The Lord CHANCELLOR.*

The principal question is now, as to the raising the maintenance and portion of £20,000.

This question has been agitated by the counsel in the interest of the plaintiff, as one in which the words of the settlement bore against the plaintiff's claims. In arguing that question, several matters have been strongly enforced by the counsel which are not proper for me to consider; as first, the large estates of the defendant, which I hope and believe to be as large as suggested; but as nothing relative to them has been proved, there is not a grain of consideration for me to affect him with this demand. Secondly, the necessitous case of the lady (which I am glad to find is not so bad) is as little fit for my consideration, because the rich and poor are equally entitled to the equity of this court; these are considerations that a court of justice ought not to entertain.

Another head which has been relied on, is, I think, as little within my province to determine; that is, the general fitness and propriety of a settlement which persons execute when they enter into the marriage state; for my business in this, and every other case, is, *jus dicere, non jus dare*; and I am glad it is not my province to chalk out the propriety of settlements, and to measure and explain the contract according to my own ideas, because,

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(a) *For.* 30.

(b) *Cit. ante*, Vol. I. p. 51.

(c) *Ante*, Vol. I. p. 77.

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perhaps, I might do it in an unfashionable manner. Nor shall I adopt the notions of conveyancers at their chambers, and explain every contract of marriage upon principles that were never thought of by the parties, as if every consideration of affection was out of the case on that solemn occasion.

The question for me to decide upon this settlement is merely, what agreement was actually made ; what power is in the trustees ; what was the intent ; and, on proper applications, to give execution to the trusts they have created ; therefore, in the present case, if I can see what the intent was as to the creation of the 500 years' term, that must be the direction I must take ; and I am not to take a liberty to model trusts according to my discretion. If, indeed, it appears that the intent is doubtful, there it may be proper to follow the determinations in similar cases.

Now, on the best consideration, I cannot have a doubt of the intent of the parties with respect to the present question at the time of making the settlement. It was candidly admitted by Mr. *Wilbraham*, that it was impossible to treat it as a case where the parties come to have a mistake rectified. The point on which the question arises is reiterated from the beginning to the end of the settlement in every clause.

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The state of the parties entering into this settlement is a circumstance proper to be considered ; and as it is fixed, the court cannot be deceived in it. This settlement was made in 1736 by Lord *Fermanagh* on the marriage of his eldest son, Mr. *Verney* ; and the present earl was his second son. Mr. *Verney* marries a lady of family, with a large present fortune, and some in contingency. Lord *Fermanagh* on this occasion makes a settlement ; his first contemplation was to provide for the husband to maintain his wife ; then to provide for sons, with remainder to first


and other sons ; then for the wife, if she should survive, to have an annuity of £1600 a year out of an estate of £2000 a year by way of jointure ; and there is a term created to cover the whole estate, and to be made use of by sale, mortgage, or any other manner, to secure the £1600 a year ; then a limitation to first and other sons in tail ; then a 500 years' term to raise portions for daughters if there be no sons, or if they die before twenty-one. The direction of that trust is as follows. [Here his Lordship stated the trusts of the term particularly.]

Now by this, the trustees are not to be called upon to act till after the death of the survivor of the father and mother, and then to raise the £20,000, and pay it at twenty-one, or marriage, which shall first happen after the death of the survivor, and failure of issue male. Now one should think, if it rested on these clauses, that it was impossible to doubt what was the intent of the parties ; that the daughter was to have this portion only after the death of the survivor, though it was payable at twenty-one, or marriage ; and it being repeated that it was to be after the death of the survivor, it could not be dreamt that it should be raised before it was payable, in the life of the survivor. It is impossible for any court to take a liberty on such an agreement to say, that notwithstanding a time is mentioned when it is to be raised, when the trust is to be made use of, and when it is to be paid to the person receiving it ; the court can order the trustees to execute the trust at a different time than that which the creator of that trust has appointed.

But for fear of a mistake, for fear that courts should be induced to go extraordinary lengths in raising portions by anticipation, and thereby mangling the family estate, it has subjoined a provision which prevents the court from executing any liberty of anticipation : for it provides, if any daughter attain twenty-one, or be married during

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the joint lives of the father and mother, or in the life of the survivor, which is the case which has now happened, that the portion of such daughter shall be paid within one year next after the decease of the survivor. This clause, therefore, puts the case of a daughter's attaining the time that the plaintiff's counsel insist upon to be the time of vesting, and supposes that time to happen, and then subjoins a bar to the giving it them by anticipation. Now on this part of the question the plaintiff's counsel have grounded their demand, that this was the time fixed for payment; that it vested at that period, and so must be raised, there being no negative words to the contrary. Now in pursuance of the principles and reasons on which the cases are determined that have been cited with regard to the vesting of portions, it is impossible for me, under these circumstances, unless I should be of opinion it should now be raised, to give an opinion on that point. Upon the principles of a former case (a) which I have determined, and which has been acquiesced in, I have laid it down as a general rule, that where there is nothing to the contrary, where the parties have fixed upon a time for the payment of a portion, that time is the time of vesting, and is the time from which the portion becomes transmissible; and it is determined on a simple principle, which appears unanswerable, that when a settlement says, as here, that the daughters shall have such a portion, payable at marriage, or twenty-one, which shall first happen, the parties mean to do this; they mean to define the time when the daughters wanted the portion; they name twenty-one, when the daughter, by law, is capable of managing it; or marriage, when she requires it for advancement; and if the portion is raiseable out of a reversionary term, where it cannot be raised by anticipa-

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(a), *Cholmondeley v. Meyrick*, ante, Vol. I. p. 77.

tion, the parties mean by the time twenty-one, or marriage, if there is a fund ; but if there be no fund, it does not postpone the time, but is postponed for want of a fund. Every subsequent clause says, if they attain in the life of the father and mother, or survivor, that it shall be paid in a year after ; therefore, with respect to vesting, it is distinct from the payment, so no opinion on it.

As to the point of raising the portion, I think, in all the cases cited, the determinations were right upon the circumstances. I think *Lord Talbot's* determination in *Hebblethwaite v. Cartwright (a)* was right on the case before him ; there he said, “ though the mortgage or sale is to be during the term, which is not to commence in possession till the father's death, yet the portions may well be raised in his lifetime ; it being nowhere said that the portions shall not be raised till after such time as the term shall take effect in possession. Indeed, had there been no express authority given to the trustees to sell or mortgage, there might be some difficulty ; but since they have the power of both, they may use that which best suits the interest of the daughters.” Here the trustees had an election to raise the portions by mortgage, or receipt of rents ; and the subsequent clause says, you shall not sell or mortgage till the portions become payable : and out of the rents and profits, it cannot be received till after the death of the survivor. It is a negative, and it is impossible for me, however much I should like it, to give this plaintiff a sum to go to market with.

As to the maintenance, that is strong on the words against the plaintiff's case, because the declaration is, “ that the trustees, after the decease of the survivor of the father and mother, and failure of issue male, shall

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(a) *For.* 30.

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raise for maintenance £400 until such daughter or daughters shall attain fifteen; and £700 a year until their portions should become payable by half yearly payments at *Lady-day* and *Michaelmas*, the first payment to be made on such of the days as should happen next after the decease of the survivor of the father and mother;" it is therefore tied up to the decease of the survivor. It is represented to me, that a hardship is hereby created; and it is said the plaintiff is entitled to have it vested and transmissible: that the mother brought a large fortune, and that the daughter has no maintenance from her father's estate. Now as to that, it plainly appears that case was in the thoughts of the parties, and they have provided with regard to it; whether they have done that wisely, it is not for me to say; but as they have provided for this case, I cannot take a stride further, and say, you were not judges of the case, and I will come and distribute to your family in other proportions than those which the settlement directs: it is impossible for a court to assume such a power. It appears there was a covenant from Lord *Fermanagh*, during the joint lives of Lord *Fermanagh* and the plaintiff's grandfather, *Nicholson*, that as his daughter would be entitled to a further portion on his death, that Lord *Fermanagh* would contribute £200 a year in maintenance; and this was on a notion, that, on the death of *Nicholson*, there would be an increase of fortune, so that plaintiff's mother would be eased, and Lord *Fermanagh* also; and that was the ground of their only providing for additional contributions to the mother, and it appears they intended to leave this daughter on the mother.

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I cannot look upon these as a set of conveyancers do, where nothing is to be considered but a *quid pro quo*, and buying an annuity at market, without looking to the situation of families. The £2000 a year is near covered

with the £1600 a year; there is a provision all along, and a supposition that here was always to be a surplus to the remainder-man to marry again, and £200 allowed by Lord *Fermanagh* for maintenance till *Nicholson's* death, £1600 a year for the wife.

I think it hard that I cannot raise this £20,000; but the parties have agreed it, and there is no case which authorizes me to do it. In my opinion, this fortune ought to have been to be raised at all events; for though I cannot give any judgment upon it, I am clearly of opinion that it actually vested at twenty-one, therefore as to this point the bill must be dismissed (a).

(a) *Vide* the editor's note *ante*, Vol. I. 77, and to *Conway* to *Cholmondeley v. Meyrick*, *v. Conway*, 3 Bro. C. C. 271.

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SIMPSON v. PAUL.

(Reg. Lib. B. 1760, fol. 452.)

By articles of agreement bearing date the 2d of January, 1717, made previous to the marriage of Dr. *George Paul* with *Susanna Malyn*, a fund of £10,000 was created for the issue of the marriage; and it was agreed that if there should be two or more children, and one or more of such children should be a son or sons, then that £4000, part of the said £10,000, should be paid to such eldest son, and the remaining £6000 should be divided between such eldest son and such other child or children, in such shares and proportions, as the said *George Paul*, and the said *Susanna*, during their joint lives, or in default thereof the survivor of them, should, by any writing or writings under their hands, or the

[ \*35 ]

9th & 10th  
March, 30th  
May, 1761.

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Care, MSS.  
Serjt. Hill's MSS.

Where there was a joint power to husband and wife of appointing a sum of money among children, with power in default thereof, for the survivor to appoint; a partial execution by both of the original power, was held to prevent the execution of the secondary power by the wife, who survived.

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hand of the survivor of them, attested by two or more credible witnesses, direct or appoint; but in default of such appointment, the said £6000 was to be equally divided between such eldest son and such other child or children, or the survivor of them, part or share alike, unless the said *George Paul* and the said *Susanna*, in their lifetime, or the survivor of them, by writing, subscribed and attested as aforesaid, should otherwise divide and apportion the same.

There was issue of the marriage one son, the defendant, *George Paul*, and two daughters, *Valentina*, afterwards the wife of *Robert Snow*, and the defendant, *Susanna Paul*.

Upon the marriage of the said *Robert Snow* with the said *Valentina*, Dr. *Paul* and *Susanna* his wife, by deed-poll, bearing date the 30th *March*, 1743, appointed, that £2000, part of the money in the said marriage articles, after the decease of the said *George Paul* and *Susanna* his wife, should belong to the said *Valentina* as her share of the sum; and the said *Valentina* and *Robert Snow*, her intended husband, released all claim, &c.

Dr. *Paul* by his will, bearing date the 4th of *October*, 1752, desired the said *Susanna Paul* to be very kind to her two daughters, *Valentina Snow* and *Susanna Paul*; and taking notice that his eldest daughter had been advanced in marriage, requested his said wife, *Susanna Paul*, to give her, his said daughter *Susanna*, so much money as would, together with what she was entitled to at that time, amount to the sum of £5000, upon her day of marriage.

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Mrs. *Paul*, by deed poll, bearing date the 26th of *March*, 1755, appointed, that the sum of £4000 which remained, subject to her appointment, should belong and be paid unto the said *George Paul*, the son, and her said two daughters, as follows: £500, part thereof, unto her

son, *George Paul*; £1750, other part thereof, to the said *Valentina Snow*; and £1750, the remaining part thereof, unto her daughter, *Susanna Paul*.

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This was a bill brought by Mrs. *Paul*'s executors, upon which several questions had arisen, and a trial had been directed at law upon another point; the cause now came on upon the equity reserved, and the principal question remaining was, as to the validity of the appointment by Mrs. *Paul* of the 26th of *March*, 1755.

The *Attorney-General*, the *Solicitor-General*, and Mr. *Sewell*, for the defendant, *George Paul*.

Mr. *Perrott*, Mr. *Wilbraham*, and Mr. *Jones*, for the defendants, *Snow* and *Susanna Paul*, contended, that the fund was divisible among the children in any proportions, according to the discretion of both parents. That the time when these sort of powers are executed is immaterial, it may be done *per vices*, *Digges's* case, 1 Co. 193. So powers of jointuring may be executed at different times, provided the limits of the power are not executed. *Hervey v. Hervey* (a). Though the appointment to Mrs. *Snow* was said to be *as her share*, yet that must only be understood as meaning her *then share*.

*The Lord Chancellor.*

The question for my determination is, whether, under the circumstances of this case, the second appointment, made by Mrs. *Paul* alone after her husband's death, be good or not; and that must depend on what was the reason and intent of the parties creating the power, as there appears to have been no judicial determination in similar cases, viz. whether, after a partial execution by baron and feme of an original power, a secondary power to arise in

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(a) 1 Atk. 561. *Barnard*, 103. et vide *Zouch v. Woolston*, Burr. 1136. Bl. Rep. 281.

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default of the execution of the original power, can have any effect; and after the best consideration I have been able to give this question, I am of opinion that a partial execution of an original power like the present, respecting the appointment of portions amongst children, will prevent the secondary power given to the survivor from taking effect.

My reason is, as the father, who had the natural right of allotting portions to his children, has thought fit to let in his wife for a part in such allotment, and in case of a default of appointment by them jointly, has empowered the survivor to allot; that they having taken up the execution of the joint power in part, have hereby brought into life that power, on the deadness of which the other was to arise; and, in this particular case, I am inclined to think Dr. *Paul* considered it so. Not that he meant to bind himself by this partial execution so as to prevent a further joint execution, if his children should require it: for these sort of powers may be executed in part at one time, and part at another, as the exigencies of the family may require; and this may be repeated at different times by the father and mother, till the whole trust money is appointed among the children. *Digges's case*, 1 Co. 173. But that he considered it as the whole of *Valentina's* fortune, appears by the expressions made use of, which is, not *her part*, but *her share*, which shews he considered himself as executing his power of allotting the shares amongst his children; and if no future allotment was made by him, that the £6000 should be shared equally amongst his three children.

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This is confirmed by the expression in his will, whereby he directs his wife to make up *Valentina's* fortune, with what she is *entitled* to, £5000 in the whole, out of his personal estate. The word *entitled* shews he considered her share as fixed, for if it depended on a subsequent

allotment by his wife, the expression is improper. His family were grown up, and it is reasonable to suppose that he considered them entitled to this £6000 in equal proportions; and, I think, it would be dangerous to say, when a father, on the proposal of a daughter's marriage, sees it necessary to exercise his power, by allotting her her fortune or share, without going further, as to his other children, till a like occasion calls for it; that he thereby leaves the remainder to be partially distributed by his widow. It is unfavourable and unreasonable to suppose he intended it; and it is derogatory to the dignity of the marriage state to allow the wife to control the intent of her husband relating to a provision for his children.

I am therefore of opinion, that as the first power was in part executed by Dr. *Paul*, the secondary power to Mrs. *Paul*, as the survivor, in default of a joint appointment, did not arise.

If it had been so intended, it might have easily been so expressed; in default of appointment of all or any part, then as to what remained unappointed, to be subject to the power of the survivor; but that not being the case here, the appointment by Mrs. *Paul* is void, and the £4000 must be divided in equal moieties between the son and his sister *Susanna*.

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In the case of *Brown v. Nisbett*, 1 Cox, 13, Lord *Hardwicke* was also of opinion that where husband and wife had jointly appointed any sum, part of what they had the power of appointing to, the survivor could not add to, or alter it. Mr. Sugden doubts these cases, observing, that the power of the survivor, according to general opinion, extends over the whole of the fund which remains unappointed; just as the joint appointment did not prevent a further joint appointment. *Pow.* 282. See the editor's



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note to *Mac Adam v. Logan*, 3 Bro. C. C. 310., where a power to the survivor of husband and wife, was held not well executed by an appoint- ment by both : also *Ingram v. Ingram*, 2 Atk. 88. *Hamilton v. Royse*, 2 Sch. & Lef. 315. *Doe v. Milborn*, 2 T. R. 721.

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27th, 28th &  
 29th Feb. 1760.  
 3d, 4th, 6th &  
 7th Feb. & 1st  
 June, 1761.

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Amb. MSS.  
 Sewell, MSS.

13 Ap. la. 6y.  
 1894. 2 Q. B. 492.


DRURY v. DRURY.

(Reg. Lib. A. 1760. fol. 465.)

Determinations of the Lord Chancellor, 1st. That the statute of 27 H. 8. which introduced jointures, extends to adult women only, infants not being particularly named; and therefore that, notwithstanding a jointure on an infant, she may waive the jointure, and elect to take dower. 2dly, That a covenant by the husband that his heirs, executors, or administrators, shall pay the wife an annuity for her life in full for her jointure, and in bar of dower, without expressing that it shall be charged on any particular lands, or be secured out of lands generally, is not a good equitable jointure within the statute. 3dly, That a woman, being an infant, cannot, by any contract previous to her marriage, bar herself of a distributive share of her husband's personalty in case of his dying intestate: reversed on appeal by the House of Lords.

By indenture bearing date the 5th of October, 1737, and made between Sir *Thomas Drury*, then *Thomas Drury*, esquire, of the first part; the defendant, then *Martha Tyrell*, spinster, one of the daughters of Sir *John Tyrell*, baronet, deceased, of the second part; and *Joseph Townsend* and *Thomas Mathews*, esquires, of the third part; after reciting a marriage then intended between the said Sir *Thomas Drury*, and the defendant, it was declared and agreed that the said Sir *Thomas Drury* should be entitled to, and receive all the personal estate and effects which the defendant was possessed of, or entitled to, for his own use and benefit; and that all the lands, tenements, and hereditaments, then late of the said Sir *John Tyrell*, deceased, which should descend to or devolve upon the defendant during the intended coverture, should be settled and assured in manner thereafter mentioned; and also that the defendant, in case she should survive the said Sir *Thomas Drury*, should have or enjoy an annuity or yearly sum of £600,

clear of all taxes and deductions whatsoever, during her life, for and in the name of her jointure, and that the same should be taken and accepted by her in full satisfaction and bar of all dower or thirds of, in, to, or out of, any lands, tenements, or hereditaments whatsoever, whereof or wherein the said Sir *Thomas Drury* then was, or at any time thereafter, during the intended coverture, should be seised of any estate of inheritance, and also in lieu and full satisfaction of any share or distributory part of any personal estate which the said Sir *Thomas Drury* should be possessed of or entitled to, and which she could or might claim or demand by virtue of the statute for the distribution of intestate's estates, or otherwise howsoever. And the said Sir *Thomas Drury*, in consideration of the said intended marriage, and of the portion which the defendant was possessed of, or entitled to, and which would accrue to him in case the said marriage should take effect, did, for himself, his heirs, executors, and administrators, covenant and agree to and with the said *Joseph Townsend* and *Thomas Mathews*, their executors and administrators, that the heirs, executors, or administrators of him, the said Sir *Thomas Drury*, in case the defendant should survive him, should pay her, during her life, the yearly sum of £600, without any abatement whatsoever, half-yearly; and also that in case any lands, tenements, and hereditaments of the said Sir *John Tyrell*, deceased, should in anywise descend, remain, accrue, or come to the defendant during her said coverture, then the said Sir *Thomas Drury* and the defendant should and would immediately thereupon convey, settle, and assure all such lands, tenements, and hereditaments, to the uses after mentioned; that is to say, to the use of the said Sir *Thomas Drury* during his life, and afterwards to the use of the defendant and her assigns during her life, and

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after her death to the use of the said Sir *Thomas Drury* and his heirs and assigns for ever.

The deed was executed by the defendant in the presence of Mrs. *Elizabeth Kellaway*, her guardian, who was also a subscribing witness. The defendant was entitled to a portion not exceeding £2000; she was then an infant, being a month under the age of twenty-one.

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On the 20th of *January*, 1750, Sir *Thomas Drury* died intestate, being seised in fee of an estate and mansion-house at *Overstone*, in the county of *Northampton*, of the yearly value of about £2600, and of a personal estate amounting to above £60,000. He left the defendant, his widow and the plaintiffs, *Mary Ann* and *Jocosa Catharina*, his only children and co-heiresses at law.

The defendant, Lady *Drury*, having taken out letters of administration, and possessed herself of the personal estate, the present bill was filed by the daughters for an account of the rents and profits of the real estate, and of the personal estate, &c.

Lady *Drury*, by her answer, insisted, that as she was an infant when she executed the said indenture of settlement, and at the time of the marriage, she could not, nor ought to be barred by the said indenture, but was at liberty to make her election whether she would accept the said annuity or waive the same, and take her dower out of the real estate, and her distributive share of the personal estate.

The cause was twice argued: first on the 27th, 28th and 29th of *February*, 1760, by the *Solicitor-General*, Mr. *Wilbraham*, and Mr. *Browning*, for the plaintiffs; and the *Attorney-General*, Mr. *Hoskins*, and Mr. *Comyn*, for the defendant; and secondly, on the 3d, 4th, 6th and 7th of *February*, 1761, by the *Solicitor-General*, Mr. *Perrot*, Mr. *Wilbraham*, and Mr. *Stains-*

by, for the plaintiffs; and the *Attorney-General*, and Mr. *Sewell*, and Mr. *Hoskins*, for the defendant.

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*For the plaintiffs.*

Two general questions arise upon the present case; 1st. Whether a feme infant can bar her right to dower by an agreement before marriage? and 2dly. Whether such agreement can bar her of her share of the personal estate of her husband under the statute of distribution?

1st. The common law considered dower as a reasonable provision for the wife out of the real estate of the husband, and totally distinct from her own inheritance. Lord *Coke* defines it so from *Bracton*, *propter onus matrimonii*, &c. *Co. Litt.* 30. *b.* ascertained by a writ of dower complete by the husband's death, inchoate upon marriage. Dower, *ad ostium ecclesie*, was a provision made by the husband of age after marriage. Dower, *ex assensu patris*, might be by an infant husband. *Bract.* Lib. 2. c. 39. But in both these cases the wife might refuse, and elect dower at common law: her power, however, arose not from her infancy, but the coverture. Infancy could not be regarded, because since infants might enter into the principal contract, marriage, it was thought consequential that they might bind themselves in every thing attendant thereon.

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This right to dower being a freehold interest, no provision could bar it by way of collateral satisfaction. *Vernon's* case, 4 Rep. For she could not give a *release* before marriage, as she had then no title to dower, and she could not be compelled to levy a *fine* after marriage: hence great inconveniences were found to arise. It was thought unreasonable that where a person of very large estate married a young woman of little or no fortune, she should be at all events entitled to one third of it.

To remedy this inconvenience was one reason of the

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invention of uses ; and as the wife was not dowable of lands in use, the husband frequently procured an estate to him and his wife, &c. for a *competent provision* for her after the husband's death ; but if, after the jointure made, the husband became seised of new lands, she became entitled to dower out of such new acquired lands also ; so that there could be no fixed provision for the wife.

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When the statute of uses was made, which transferred the use into possession, if some particular provision had not been inserted, the wife would have had both her jointure and dower. The subsequent clauses were therefore inserted in the statute, to prevent those wives who had jointures already made from taking any further provision by way of dower ; it therefore recites that "whereas divers persons have purchased, or have estate made or conveyed to them," the words not being confined to purchase, but extending to conveyances being made. In all cases where jointures are made, the subsequent marriage, which at common law gave a title to dower, after the act gave no such title. It does not therefore arise from the consent of the wife that the jointure takes away the right to dower, but having the jointure she does not gain any title to dower.

The words of the act are so general that it gives no colour to the constructive exception of infants : "every woman married, having jointure made, shall not claim nor have title to any dower : " this includes infants. The statute was penned with the greatest accuracy, and after the most mature deliberation. If it had been intended by the legislature that infants should have been omitted, it would have been so provided. The only case in which the wife might have been injured by the power and influence of the husband, viz. in jointures after marriage, is expressly provided for by the act. This provision proves the rule of construction to be general, where not other-

wise provided for: the bar to dower is created and opposed to married women, and the proviso only removes the bar at their election in one particular case, and in that only.

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A question must have arisen upon this act, whether a woman could refuse a jointure before marriage, within thirty-five years after it passed: for in the case of the Earl of *Leicester v. Haydon*, *Plowd.* 396 a. which occurred in the 13 *Eliz.*, *Anderson*, after mentioning the proviso in the statute, observed, that "forasmuch as it speaks of an assurance after marriage, it has been held, that if the assurance be made before marriage, she shall not refuse it; for the judges took the intent of the makers of the act to be so by the implication of the words." The words of the fourth resolution in *Vernon's* case, are equally explicit and comprehensive; that "if a jointure be made to a woman before marriage, after the husband's death the wife cannot waive it and take dower." And again in *Co. Litt.* 37 a. it is laid down equally generally, "if a jointure be made before marriage, the wife cannot waive it and claim dower at common law:" upon which passage Lord *Hale*, in the margin of his own *Co. Litt.* has added these words, "*licet ell soit deins age ne poet waive ut videtur.*"

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In the construction of all statutes infants are bound, unless expressly excepted. The 1 *Ric.* 3. c. 1. enabling *cestuy què use* to make feoffments; the 1 *Ric.* 3. c. 7. and 4 *Hen.* 7. c. 24. as to fines; the 23 *Hen.* 8. and 21 *Jac.* 1. Statutes of Limitations, expressly except infants. The case of *Stowell v. Zouch*, *Plowd.* 353. is in point, that general words extend to infants. In penal acts they are even comprehended.

It is objected from the statute of wills, that infants are comprehended in that act which uses the most general terms. That objection may be answered, first, that in-

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infants are restrained by the express provisions of 34 *Hen. 8.* which shews that there was at least considerable doubt whether they were not comprehended. Secondly, That it would have been absurd that infants should be enabled to that by will which they could not do by deed. Thirdly, That the statute of wills differs from the present, inasmuch as it is an empowering statute, which the present is not: here the woman is not an actor.

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The cases of *Price v. Seys* (a), and *Hervey v. Ashley* (b), are authorities from the point; in the former, Lord *Hardwicke* said, that it was clear law that if a man married, and before marriage, in consideration of it and her portion, makes a jointure on his wife, though she was an infant she cannot waive her jointure; and afterwards in *Harvey v. Ashley*, Sir *Dudley Ryder*, who was counsel for the infant, speaking of *Price v. Seys*, observed, that the dower being barred was no more than the effect of the statute of jointures, which makes all jointures of infants, as well as women of full age, a bar. *Harvey v. Ashley* was determined by Lord *Hardwicke*, after great deliberation, and from a written opinion. His Lordship thought that marriage agreements differed from all others; that the principal consideration was the marriage: as soon as that was had, the contract had become executed, and could not be set aside; for the children were purchasers, who acquire a right which cannot be defeated by the failure of either party. His Lordship added, that this court should be tender of breaking in upon marriage contracts. The law intrusts fathers and guardians with the marriage, therefore it must with the settlement: if they are guilty of a breach of trust, they must be chargeable.

The opinion of conveyancers has been uniform, that

- (a) *Bernard*, Ch. Rep. 117. also a note of this case in  
 (b) 3 *Atk.* 607. There is *Wilm. Op. &c.* p. 219. a.

an infant feme might be bound by a jointure, who consider the dower as sufficiently barred by a jointure, and that it is unnecessary to inquire whether such jointure was made on an infant or an adult. In the course of the 225 years which have elapsed since the passing of the statute, no attempt has been made to overturn a jointure made before marriage on the ground of infancy; the opinion has so far prevailed, that half the settlements in the kingdom would be overturned by a contrary decision. The Court of Chancery too, has, by its constant practice, sanctioned this construction of the statute, by directing, on the application for the marriage of an infant female ward of the court, that the Master should see a proper settlement made. The court must certainly have always understood that such settlement was binding on both parties.

The words in the present case will make a good equitable jointure; for though it does not stipulate a jointure of freehold in lands, yet it stipulates an annuity *for and in the name of her jointure*. Lord Coke defines a jointure to be a competent livelihood of freehold in lands for the life of the wife, to take effect presently, in possession or profit, upon the death of the husband. A court of equity would therefore perceive that this was an ample provision, stipulated before marriage, and accepted by the defendant: they are a specific lien upon the husband's lands. Wherever provisions have been made for married women, either out of trust estates, or out of the funds, or out of copyholds, equity has carried them into execution. *Davila v. Davila*, 2 Vern. 724. *Vizard v. Longden* (a). *Jordan v. Savage*, 2 Eq. Ab. 102 (b). Every agreement may be carried into execution in a court of equity, and all cases that regard marriage agreements

(a) See this case stated, and the observation upon it, *post*, p. 66.

(b) See *post*, p. 66.

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have been universally protected. *Strickland v. Coker*, 2 Ch. Ca. 211. *Vernon v. Vernon*, 2 P. W. 594. *Lechmere v. Earl of Carlisle*, 3 P. W. 211. *Walker v. Walker* (a). *Goring v. Nash* (b).

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2dly. As to the right of the infant to bar her share of the personal estate of the husband. At common law, marriage was considered as an absolute gift to the husband of all the wife's personal chattels, and in case of the husband's surviving, of all her real chattels, *Co. Litt.* 151 a. and equity held that a chose in action, or a contingent interest in the wife, might be assigned by the husband, *Duke of Chandos v. Talbot*, 2 P. W. 607. To remedy this exorbitant power of the husband, equity supported all agreements previous to marriage as calculated to abridge it. *Franklin v. Thornbury*, 1 Vern. 132. *Blois v. Lady Hereford*, 2 Vern. 502. *Cannel v. Buckle*, 2 P. W. 242. And the argument in favour of this power is stronger than in respect of real estate, for even supposing that the husband could not prevent his infant wife from electing dower after his death out of his lands, yet it must be admitted that he could by will or otherwise have given his personal estate away at pleasure: her right to it arose as much from his intestacy as her marriage. Probably Sir *Thomas Drury* omitted to make a will, relying upon the validity of the instrument. See Lord *Cowper's* reasoning in *Davila v. Davila*.

*For the defendant.*

The first question for the consideration of the court is, whether a deed, purporting to be a jointure of lands on an infant, can bar her claim to dower? Secondly, Whether the present deed contains such a provision as to be considered a jointure in a court of equity? And thirdly,

(a) 1 Ves. 54.

(b) 3 Atk. 186.

Whether an infant feme can bar her claims to her share of her husband's personal estate under the statute of distribution ?

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1st. At common law the provisions attendant upon the marriage contract were settled with great wisdom ; the husband took the whole of the wife's personal estate, was entitled to one-third of her real estate by courtesy, and the wife surviving her husband was reciprocally entitled to one-third as her dower. No jointure made on her, though she was of the age of twenty-one, could then bind her ; but she might waive it, and claim one-third of any estate which the husband had been seised of at any time during the coverture.

After the statute of uses, a jointure made upon her previous to marriage was held conclusive. The law allowed no collateral satisfaction to bar dower, the statute points one out. It must be made of lands and tenements, to take effect in possession or profit presently after the death of the husband, and be for the term of her life, or a greater estate, otherwise she has her election to take dower or not, in the same manner as it was not intended that it should be in the power of the husband to impose a jointure without the consent of the wife ; she was also allowed to elect in the case of a jointure made after marriage.

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As the law stood then, and has ever since been clear and undoubted, that no conveyance or acceptance of any real estate could bind an infant either male or female, it could never be the intent of the act that a jointure made upon an infant feme should be conclusive. As the legislature, therefore, had no thought that an infant could have power to enter into so important an act, they were not mentioned. It could never have been intended that infancy should deprive the wife of this important right of choosing for herself, and give the power to the husband

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of imposing what jointure he pleased upon her. These general acts must be construed according to the subject-matter which they treat of, and the intent of the legislature respecting it, and not according to the most extensive construction which the words will bear. Many instances are given of this equitable construction of statutes in *Plowden's* note at the end of the case, *Eyston v. Studd*, 465. Such a doctrine would produce great inconveniencies; a man of a great real estate might procure an infant of the tenderest years to marry him, and by settling a small part of his real estate upon her by way of jointure, bar her of dower, while he at the same time acquired an absolute property in all her personal estate.

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As to the marginal note of Lord *Hale*, is it, in the first place, clear that it is his handwriting? If it is, is his mere *dictum* an authority? Lord *Coke's* comment, where he says, that a jointure made, whether the infant be above or under the age of nine years, is good, is now given up: and in considering Lord *Hardwicke's* opinion, it must be remembered that it was only an *obiter dictum*, and founded on the authority of this passage. The case of *Harvey v. Ashley* did not call for such an opinion: the court only there decided, that a husband, having made a proper settlement on the wife, with the consent of her friends, might model her fortune as he pleased. The authority of Sir *Joseph Jekyll*, in a case which more immediately called for the determination of this point, is the other way. In the case of *Cray v. Willis (a)*, 9 *Vin. Ab.* 249. he was of opinion that a feme infant might elect to abide by a jointure made to her upon marriage when she came of age.


2dly. Even supposing that it was intended, upon the

(a) There is a short note ter's book, in *Wilm. Op. &c.* of this case from the regis- p. 223.

construction of the act of *Hen. 8.* that an infant should be bound by a jointure of lands, yet, in the present case, there is no jointure of lands; it is neither a grant of lands, nor of any interest or estate out of lands; it is a mere covenant to pay an annuity, which cannot in law be considered as within the intent of the act. And though there may be equitable bars to dower, either by the settlement of land, of which the husband is at the time of the marriage seised of the reversion or remainder, or of copyhold, or leasehold, or other personal estate; yet none of the instances produced shew that in those cases the wife was an infant at the time of the settlement. There was no real security for the performance of the covenant; so that the husband might, before his death, have disposed of all his real and personal estate, and left the defendant destitute of all provision.

3d. As to the third question, whether the defendant could be barred by this agreement of any right which the law gives her in respect of her share of her husband's personal estate, that is wholly foreign to the consideration of the statute of 27 *Hen. 8.* which only regards real estates. There is no foundation for equity to confirm such an agreement of the infant, it being altogether unnecessary, as the husband, notwithstanding the marriage, has an absolute power over the personal estate during his life-time, and by will after his death; and no instance can be shewn of any agreement made by an infant which could bar him or her of any contingent possible right or interest either in a real or personal estate.

As to the argument that the contract for making a provision consequent upon marriage and the marriage are one entire contract, and ought to be performed by both the contracting parties, there is no foundation for any such rule either in law or equity. Settlements, or agreements for settling, by an infant husband, by way of

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provision upon himself or children, cannot be binding; nor of an infant wife to settle her own lands upon the husband and the issue of the marriage, unless afterwards assented to: nor have the opinions of great lawyers been so unanimous as are represented. Mr. *Pigot*, in the case of Sir *Marmaduke Dorrel*, considered the matter to be so doubtful, that he recommended the opinion of the court to be taken upon it. The reason why the point has not been raised before is, because no question is ever asked as to the age of the wife: the word jointure has been considered sufficient to satisfy all inquiries.

*The Lord Chancellor.*

1st June.

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(After stating the prayer of the bill, and the settlement.) The question is, whether, sitting in a court of equity, I can bind the infant to a specific performance of this agreement, and bar her from claiming her dower at law, and her share of the personal estate, under the statute?

The law of *England* which, from a principle of natural and political wisdom, allowed and encouraged early marriages, and from a principle of equal wisdom disallowed young persons to enter into personal contracts till they attained a reasonable maturity of judgment, (which the universal consent of this nation fixed at the age of twenty-one,) found it necessary to accompany their maturity for natural contracts by its own provision for the civil rights, reciprocal to both the parties that entered into the marriage state.

In this, as well as in other cases, the ancient law neglected personal estate as an object then, as it really was, of no consideration, and solely regarded the realty. The *quantum* provided for the wife was one-third of the lands and tenements of which the husband was seised during coverture, with a reciprocity as to the nature of the estate

which was required to be such, as if the wife were seised of the like estate, the husband would be tenant by the courtesy. Of this provision, made by law, she could not be deprived, nor could the husband augment it but by contract after their respective ages of twenty-one years; for if the husband varied this proportion by endowment, *ad ostium ecclesie*, he must be of full age; if the endowment is *ex assensu patris*, it is of lands, &c. whereof the father is seised in fee, and consequently is the endowment of the father, and not of the son; but in both these cases the woman is not bound till she enters and agrees after the death of the husband. The law throwing descents first on the males, seems to have considered the woman as purchaser, and sufficiently invited by dower to matrimony, though she paid as a price for it her personal estate.

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This seems to be, in brief, the wisdom and provision of the law touching rights consequential to the marriage contract; and I cannot find that the law apprehended, or that, in fact, it happened that marriages were impeded or procrastinated by the disability of minors to agree to settlements. If a want of such power is attended with impediments of that sort, the legislature knows when to interpose, and is alone, in my opinion, equal to authorize the regulations.

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The law has been indeed much arraigned as being too liberal in its provisions to the wife; and it was asked, what man of £15,000 *per annum* would marry, if the wife was to take a third, when the heir was to be cramped to £10,000 *per annum*, and stinted in luxury, expense, and diversion, for the sake of his mother? It was intimated that the husband might put in trust what part of his estate he pleased; to this it was answered, "true: but then he cannot in his own name avow on his tenants." I do not find, however, that these considerations weighed

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with the legislature: I am sure they ought to be weighty indeed to induce this court to vary legal rights.

But it is said that the law is altered by that part of the statute of uses which relates to jointures, and that by the operation of that act, a husband, settling any proportion of his lands on his wife to vest in possession on the death of the husband, may bar her of her dower, though she be a minor. And, secondly, that this court, following the law, should bind a minor marrying, where the provision made is as effectual and substantial for her. And thirdly, that this is the present case. And for the first position is urged principally, that the words of the statute being general, comprehend infants as well as mature persons, there being no saving but a particular provision to permit women to waive a jointure made during coverture.

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At the time of making the statute of uses (27 Hen. 8.) it appears that lands were in general conveyed to uses; and the statute recites many inconveniences and wrongs resulting from that practice; whether they all really existed may perhaps be a question. The remedy at the same time provided by the statute was the most obvious and effectual that could be thought of, by annihilating uses, by transferring the possession to the use.

One of the grievances recited was, that uses fraudulently deprived women of their dower, because the woman could be endowed of that estate only whereof the husband was legally seised. But as it very often happened that men had kept part of their estates in use, and taken a legal seisin for the rest as a provision for their wives and issue, pursuant to the marriage agreements, as appears by the sixth section of this act, which recites, that "whereas divers persons have purchased, or have estate made and conveyed, &c. unto them and wives, and to the heirs of the husband, or to the husband and to the wife,

and to the heirs of their two bodies, or to the heirs of one of their bodies, or to the husband and wife for the term of their lives, or for term of life of the said wife;" and consequently as the operation of the statute would enlarge in many cases the dower of the wife contrary to the agreement of the marriage, the statute enacts, with a retrospect, and with a future regulation, "that where any such estate or purchase as are before recited have or hereafter shall be made, &c. for the jointure of the wife, that then every woman married having such jointure made, or hereafter to be made, shall not claim nor have title to have any dower of the residue," &c. The ninth section provides, "that if any wife have, or hereafter shall have, any manors, &c. unto her given or assured after marriage, for term of life or otherwise in jointure, except by act of parliament, and the said wife after that, fortune to outlive her said husband, the wife may, after the death of the husband, refuse, and take her dower at common law."

Upon the state which I have drawn of the common law, the wife, a minor at the marriage, was under a disability of depriving herself of dower *ad communem legem*; and this is a point always to be had in view in the construction of the statute concerning jointures.

The next material observation which occurs to me is, that to support the plaintiff's claim, this statute must operate either as a statute *enabling an infant to agree* to a jointure and bind herself, or, secondly, that it *enables the husband to impose* a jointure on the infant wife, *volens volens*, at his own will and pleasure as to the *quantum*.

Now that it should have been the legislature's intent to have given maturity to an infant to enter into so material a contract under a natural defect of judgment, and contrary to the protection which the law, from intrinsic equity, in all cases extended to infants, I think, should

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appear to this or to any court in capitals before it can be so pronounced. Nothing, in my opinion, can evince such an intent but express words, not capable of being mistaken, and uttered by an authority that must be obeyed. In the statute now under consideration I find no express mention of infants, nor a hint throughout the whole that their case was particularly under consideration, or any intimation of a design to change their rights, or deprive them of their legal protection.

Rule of construction of general words in acts of parliament.

But it has been urged from the statute to prove such intent, first, that the words are general, and that infants are comprehended. Now that argument must be supported upon this, that the general words in an act of parliament must be expounded in a sense as universal as the terms will reach; whereas I conceive that they are restricted *secundum subjectam materiam*, and the legal consideration of the acts, and persons to which they are referred; and that an exposition *ad ultimam vim terminorum* is exploded by the best authorities, and by such authorities as have grown to the strength of rules and maxims of construction.

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By the statute of *Gloucester*, c. 1. The disseisee shall recover damages in a writ of entry founded upon disseisin against him which is tenant. But if a feoffment be made to three jointly, and the survivor never agreed, though he becomes tenant he shall not be liable to damages. *Lit.* sect. 685. Lord *Coke's* comment upon this section is as follows: "Here it appeareth that acts of parliament are to be so construed, as no man that is innocent, or free from injury or wrong, be by a *literal* construction punished or endamaged. And therefore, in this case, albeit the letter of the statute is, generally to give damages against him that is found tenant, and in this case the survivor is found tenant, yet he shall not be charged." 1 *Inst.* 360 a. And in fo. 365 b. he states

other cases within the letter and general words of a statute not comprehended in it, and draws this rule, *qui hæret in litterâ, hæret in cortice*. And in fo. 372 b. he lays it down as a maxim, that the surest construction of a statute is by the rule and reason of the common law; and if, without regard to this rule, enabling statutes were to extend to infants, the law has been hitherto very much mistaken (a).

The statute of wills (32 H. 8. c. 1.) enacts in more general words than the present, "that all and every person and persons having, or which hereafter shall have, lands, &c. may devise." The words comprehend having lands, why not infants at fourteen? They can dispose of £100,000, why should they not of £500 *per annum*, six times less valuable? The act was made for the end of natural and civil justice, the payment of debts, and provision of children. Plausible reasons! and yet it does not extend to infants. But in order to enable an infant to agree to a jointure, and to take less than the law has defined as a reasonable provision, is it to be held that it does extend to them? Why, and for what reason? Because we are told that men are become too sordid to marry on those terms, and that she would otherwise be compelled to live unmarried to twenty-one.

So again in the construction of the statute 31 H. 8. that "all monasteries and colleges, &c. which shall happen

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(a) See the observations of *Wilmot*, C. J., upon the construction to be put upon general words in acts of parliament, *Wilmot's Opinions*, 194. also of Sir W. *Grant*, in *Beckford v. Wade*, 17 Ves. 92. and of *Holroyd, J.*, in *Edwards v. Dick*, 4 B. & A. 216. As to the effect of the preamble in controlling enacting clauses, vide Co. Lit. 79 a. and *Hargrave's* note to it, and the cases cited in the notes to *Copeman v. Gallant*, 1 P. W. 320.: also *Barrington* on the Statutes, 394.

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to be dissolved, &c. or by any other means come to the king's highness, &c. shall be by authority of this parliament, vested in the actual possession of the king ;" it was adjudged that a monastery coming to the king's hands by the statute 1 E. 6. was not within the act, though comprised within the general words ; and this upon the authority of the determination on the 13 *Eliz.* c. 10. that bishops, though comprised within the general words, were not within that statute : *Archbishop of Canterbury's* case, 2 Rep. 46. These are authorities so well established, that, as I said, they are grown into rules and maxims.

But, secondly, it was urged, and very properly laboured by Mr. *Solicitor-General*, that the provision with respect to jointures made to feme coverts proves the rule of construction to be general where not provided for ; but nevertheless I cannot help thinking that the provision for them was rather inserted *in majorem cautelam* against the general words of the statute, which are obligatory as to settlements made on wives, and within which description infant wives, as such, would have been comprehended.

These are the reasons which will not suffer me to think that the statute *enabled infant girls to agree to settlements*, so as to bind themselves, and bar them of their legal provision, dower.

[ 57 ]      Secondly. If the statute does not operate so as to enable the infant wife to accept a settlement, it must operate so as to *enable the husband to impose* a jointure on her, *nolens volens*, at his own will and pleasure as to the *quantum*.

I really know not which of the propositions is most repugnant to natural justice and to the principles of the common law ; for the estate which is to bar dower is of no defined value by the statute, and if it be made up of the qualities and accidents specified, it is a legal bar, and every court of law is bound to accept it as such. But it

was said, if the jointure was disproportionate, this court would relieve on the head of fraud. I have attended very closely to that answer, but am entirely at a loss to find any foundation for it. What measure is the court to make of this disproportion? The husband's estate? The wife's fortune? Her family? Her person? Her endowments? I am lost in the impossibility of equity's interposing, and frightened with a jurisdiction that I should attempt to introduce.

I have examined all the cases that were cited, and many authorities both in law and equity, and have not been able to find that the courts have bound an infant by any agreement not confirmed after twenty-one.

27 Car. 2. 2 Cha. Cas. 211. *Coker* was seized of a church lease in trust for *Robert Strickland*, an infant. On a treaty of marriage between the infant and the plaintiff, and in consideration of £1000 portion, an indenture was made, with the consent of *Coker*, the infant's guardian, whereby the infant covenanted that the wife's life should be inserted by way of jointure; but there was no covenant by *Coker*, who sealed the indenture. The book says the marriage took effect, the husband (not saying then an infant) dies; the lease was surrendered, and wife's life put in; she came for an assignment, and *Coker* claimed an incumbrance on the lease which the court postponed to the wife; the relief was against *Coker's* fraud, and no question was made on the infant's covenant. And it is to be observed that the case is not in Lord *Nottingham's* MSS.

*Franklin v. Thornbury*, 1 Vern. 132. is a paltry note of the reporter's, where he says, in the same case, "an agreement being void against an infant, yet was decreed; the infant having received an interest under it after he came of age;" which imports, that otherwise it would not have been decreed.

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In *Cannel v. Buckle*, the principal case is only upon the execution of an agreement by a wife of maturity, notwithstanding the subsequent marriage, where it was objected as a general rule, that no specific performance could be decreed where no damages could be recovered at law. The court refutes that general rule by this case: suppose a feme infant seised in fee on marriage, with the consent of her guardians, should covenant in consideration of a settlement to convey her inheritance to her husband. If this were done in consideration of a competent settlement, equity would execute the agreement. The state of this case supposes the infant to die in her minority, or before she had confirmed such agreement. This is no adjudged case, and for my own part I very much differ from the supposed decree in this supposed case.

Two opinions, indeed, of very eminent judges have been cited upon the binding force of this statute: the one of Lord *Hale's*, from a marginal note in *Co. Lit.*; the other of Lord *Hardwicke*, from a note taken at the bar.

As for the marginal note supposed to be Lord *Hale's*, it is too uncertain for me to make a serious comment upon; as also is that argument, much built on and laboured, the want of curiosity and oscitancy of conveyancers, who, it is said, when they hear the word jointure are satisfied, and never inquire whether the woman is a minor or not when she is married; that is, in other words, whether the dower was barred or not; a point which, unless we have much misspent our time, was certainly worth inquiring about. Besides, Mr. *Attorney-General's* conveyancers differ from Mr. *Wilbraham's*, for, according to his account, they never thought about it; which is natural enough, their time being more dedicated to perusal than thought.

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As to the alleged opinion of Lord *Hardwicke*, I shall

not presume to treat it as his opinion. I concur with him in every reason which was material for the determination of that cause; this was not. If it had been, I should have taken the liberty of conversing with him upon it before I pronounced my decree. Considering it, therefore, as a position in the abstract, I differ from it; and upon the best information I can get, till the courts of law judicially determine the contrary, I am most clearly of opinion "that a jointure made before marriage on an infant wife may be waved after coverture."

Having declared my opinion upon the first question, I have not a great deal to add on the second and third points, which may, and indeed will, be reduced to one. But I cannot help taking notice of the particular settlement in question, and laying it down as a principal ground of my determination, that the interest there raised to Lady *Drury* is destitute of all the substantial qualities required by the statute. First, No legal estate in lands, &c. is conveyed to the lady; secondly, no equitable lien on any real estate of the husband is created. For though it is said that the annuity is to be in the name of a jointure, it is agreed to vest only on a contingency, and to attach not on Sir *Thomas*, but contingently on his representatives; and unless there were proof of mistake or fraud, I do not conceive this court could interpose to better the security.

27 Car. 2. In *Gladstone v. Ripley*, Lord *Nottingham* held, first, that a jointure of a copyhold is no bar of dower at common law. Secondly, that an agreement precedent to marriage to accept it as such, makes it a bar in equity, and therefore he staid the suit at law.

But as I have in this case been forced to give my opinion that Lady *Drury* could not, being an infant, have bound herself by the acceptance of a legal estate, I should be inconsistent to say that she has bound herself

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by the acceptance of this covenant, which is no security at all for the annuity intended by Sir Thomas.

A bill in equity is a very uncomfortable jointure, a very uncertain maintenance, and not a remedy so near at hand as an ejectment. Besides, in the present case, it is to be bought at the price of dower, and her share of the personal estate under the statute of distribution or otherwise.

Declare, that the defendant, Lady Drury, being an infant at the time of her executing the indenture of the 5th of October, 1737, was not barred of her dower in the intestate's real estates, nor of her share of his personal estate, under the statute of distribution.

12 Ch. D. 677. 1394. 2 Q. B. 492.  
 13 Up. 12. 67.

S. C.

3 Bro. P. C. Ed.  
 Toml. 492.  
 4 Bro. C. C.  
 505. n.

EARL OF BUCKINGHAMSHIRE v. DRURY.

(Journ. Dom. Proc. Vol. 30. p. 273. 277. 278.)

SOON after the above decree had been pronounced, the Earl of *Buckinghamshire* and *Mary Ann Drury* intermarried, and the cause being revived, the present appeal was brought.

The reasons for the appellants were signed by Mr. *Yorke* (who had then become *Attorney-General*), and Mr. *Perrot*: the reasons for the respondents by the *Solicitor-General* (Sir *Fletcher Norton*), and Mr. *Sewell* (3 Bro. P. C. Ed. Toml. 496. 500.)

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After hearing counsel on this appeal, it was proposed to ask the opinion of the judges upon a point of law, and they were accordingly directed to deliver their opinions to the House upon the following question: viz. "Whether a woman married under the age of twenty-one years, having before such marriage a jointure made to her in

bar of her dower, is thereby bound and barred of dower within the statute 27 Hen. c. 10 ?”

The judges, seven of whom were present, differing among themselves, were directed to deliver their opinions *seriatim*, with their reasons. Accordingly, Mr. Baron Gould, the Lord Chief Baron (*Parker*), and the Lord Chief Justice of the *Common Pleas* (*Pratt*), delivered their opinions in the negative. Mr. Justice *Wilmot* (a), Mr. Justice *Bathurst*, Mr. Baron *Adams*, and Mr. Baron *Smythe*, in the affirmative.

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I concur entirely in opinion with the majority of the judges, but I do not think it necessary to resume the arguments at large, but shall only take notice of such of them as lead to the determination of the merits. For their opinion on that point is not conclusive, though it was necessary that they should be taken from the declaration in the decree, because equity follows the law, and to know whether the infant would have been bound by a legal jointure. I shall therefore rely on the opinion of the four judges ; but I must observe thus much, that the time which has elapsed since the statute, and the silence and want of resolutions on this head, are stronger arguments than a great many cases : for it shews this point has never till now (and it is two hundred and thirty-five years since the statute) been called in question.

The practice of marrying young persons of fortune under age was more frequent in those days than in later times ; the reason was from the law of tenures and wardships. For if a man died, leaving a son or daughter under age, the lord would be entitled to the marriage,

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(a) Mr. Justice *Wilmot's* in his *Opinions and Judgments*, p. 177.



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and otherwise to have the *valor maritagii* : therefore it is clear a father, as soon as his son or daughter came to a marriageable age, would himself choose a marriage for them. This shews that these marriages and jointures on infants must have been more frequent than in modern times. The lord, too, was equally forward ; for if the father died, and his child was unmarried, the lord would tender marriage as soon as the child attained the marriageable age ; for otherwise he might lose the marriage.

One thing on this statute was truly laid down, that the retrospective provision is penned in the same manner as that for the future : and that if the statute did not bind such women as were then married, it did not bar them of dower ; and then would not have cured half the mischief : and certainly, from the reason of tenure, above half were married under age at that time.

Another thing was mentioned by Mr. Justice *Wilmot*, who began for the affirmative, and entered largely into the subject, and explained the nature of jointures very ably, and threw a new light on the cause by entering into the law relating to provisions and settlements of this kind, as they stood before and at the making of the statute : he said, that the statute intended to create a bar by jointures then made, or after to be made, without any regard to a contract.

The Chief Justice of the *Common Pleas* puts it upon the foot of a contract. But the recital of the statute supposes the contrary : for it recites the instances of settlements of inheritances, and they might be made by ancestors of the husband. Where then is the contract ? But the Chief Justice gave a definition of a jointure, that it was a contract for a provision for the wife after the death of the husband. I say, no book defines it so. Lord *Coke* and others say, it is a *provision of livelihood*, but do not take in the word or idea of *contract*. I was therefore

surprised at the positiveness with which this was asserted.

Let us reflect on the usage in families before this law. In most great families a particular estate was kept in that state, and usually so settled from generation to generation. In most great families there is a house that is called the jointure-house, and the case in *Dyer* (a) proves, that if a father or grandfather settles on his son or grandson, and such woman as he shall marry, it is a good jointure. Where in such case can be the contract? The wife is supposed to rely on that when she marries.

As to the cases of *Seys v. Price*, and *Harvey v. Ashley*, it has been affirmed that they were determined singly, upon the authority of the 1 *Inst.* 37. I believe that book was produced; but as to their proceeding singly upon that *dictum*, I deny it. Though the passage is very material, and the counsel argued upon the observation, "that a jointure made to her under or above the age of nine years is good", contending, that it meant good to bind both parties. For otherwise, as Lord Coke was so accurate a writer, it is probable that he would have gone on and said, "unless the wife was an infant." Neither was it that authority that determined Sir D. Ryder in the case of *Harvey v. Ashley*, to give up that point, and admit in words that the infant was bound by it, and barred of her dower.

Another thing was said, that the authorities cited were cobwebs thrown over the statute. I rather think they are lights upon the statute. One of those lights was what is mentioned by *Hale* in the margin of the 1st *Inst.*

(a) *Ashton's case*, 228 a. done in consideration of the *Dyer*, in the MS. of this case, jointure, nor was it done of thought that the wife should lands of the baron, nor by the not be barred, for it was not baron according to the statute.

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which was treated with great disregard [here his Lordship \* pronounced a high encomium on Lord *Hale*, and said he had always been looked upon as one of the greatest luminaries of the law], and though it was called a private note, his MS. authority had been always highly esteemed; the original was given by Lord *Hale* to the brother (a) of *Phillips Gybbon* (b), who lent it me when I was young at the bar; and, in the original book, cases are cited in the margin under Lord *Hales's* own hand, written in his strongest time, when he was judge of the *Common Pleas*, before the Restoration. Lord Chief Justice *Holt*, who was as great and able a judge as ever sat in the *King's Bench* (except *Hale*), when he doubted of points of law, has borrowed manuscripts of *Hale's* family to decide his opinion. I think, therefore, that things from reverend hands deserve to be treated with reverence.

The opinion of conveyancers in all times, and their constant course, is of great weight. They are to advise, and if their opinion is not to prevail, must every case come to law? No; the received opinion ought to govern. The ablest men in the profession have been conveyancers. Sir *Orlando Bridgeman* (a book of whose precedents has been published), *Webb*, a great practiser in the *King's Bench*, was an able conveyancer, and the present Mr. *Filmer*.

In the next place, the judgment and established practice of the court of *Chancery* is I think of the greatest weight.

(a) This is probably a mistake for the *father* of *Phillips Gybbon*, see the account given of these MSS. from a note of Lord C. B. *Parker*, cited in the preface to the 13th edition of *Co. Lit.*

(b) Many years member for *Rye*, and made one of the lords of the treasury, after Sir *Robert Walpole's* resignation: he died in *March*, 1762.

From these considerations I take it for granted, that the law and foundation of this case is settled that an infant, having a proper jointure made, is bound and barred by it.

The next thing is the consideration of equity, whether the jointure, or an equivalent to it, will not bind in a court of equity? To determine this let us define what is a jointure. The law does not say a contract for, but a competent provision of, livelihood. Then the general rule is, equity follows the law in the substance, though not in the mode and circumstances of the case. Therefore, if that has been done which is equivalent to what the law would call a jointure or conveyance of any other nature, it will bind in equity. Every certain provision with consent of the wife, parents, or guardian, though not a jointure within the statute 27 H. 8. is good in equity. This is built on maxims of equity, which regards the substance, and not the forms. What for good considerations is agreed to be done, is considered as done, and allowed all the consequences and effects as if actually done; especially if the condition of the parties is changed, for that cannot be rescinded; so what is fairly done before ought to be established. This jurisdiction of equity is grown up from necessity from the change of circumstances and times, and to comply with the occasions of families and the exigencies of mankind.

As property stood at the time of the statute, personal estate was then of little or trifling value; copyholds had hardly then acquired their full strength, trusts of estates in land did not arise till many years after (I wonder how they ever happened to do so). But the chief kind of property then regarded was freehold estate in land, and so the statute applied to that only. But how many species of property have grown up since by new improvements, commerce, and from the funds. Equity has

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therefore held, that where such provision has been made before marriage, out of any of these, she shall be bound \*by it. Consider how many jointures there are now made on women out of the funds, and none of them within the statute 27 H. 8. So multitudes of jointures out of trust estates, not one of them within the statute; yet equity has always supported them. So also of copyhold lands.

The case of *Jordan v. Savage* was decreed by Lord King: [here his lordship gave a great character of him, and remarked, that he had been Chief Justice of C. B.; in which court only writs of dower can be brought:] and though it has been said she took possession of the lands limited to her for jointure by the articles, I answer that the question was upon the free bench, which extended to the whole land, therefore her entry upon part of the land did not bar her of the rest.

*Vizard v. Longden (a)*, in which I was counsel, was also decided by Lord King. That was a bill brought by the brother of the husband, who died intestate, against the widow, for an account of the personal estate, and to be relieved against her claim of dower by reason of an agreement contained in a condition of a bond entered into before marriage. She by her answer said, that her husband agreed to settle on her a clear annuity of £14 *per annum*; and no particular lands were mentioned (omitting in her answer the words which were in the condition, for her provision and maintenance), and prayed to have the annuity made good out of the real estate, the personal being

(a) There is no report of which cases some doubt was this case: it has been cited thrown upon it by Lord by various names in *Jordan Rosslyn*, which, however, ap- *v. Savage*. *Tinney v. Tinney*, pears to have originated from 3 Atk. 8. *Walker v. Walker*, a misapprehension of the 1 Ves. 55. *Couch v. Stratton*, point decided in it. 4 Ves. 394. in the last of

deficient, and also to have her dower. The *Master of the Rolls* declared in his decree, that there was not any \* sufficient proof of the averment, that it was in bar of dower, and so decreed the £14 *per annum* to be made good out of the real estate, and also dower. But Lord *King* reversed the decree upon consideration, and declared she was only entitled to the £14 *per annum* out of the real estate of her husband, by virtue of the bond, and that the said £14 *per annum* was a bar of dower out of the residue. 1st. I observe this bond must have been general, without mentioning specific lands, because she claimed on this footing, that the personal estate was insufficient to answer the annuity. 2dly. That the *Master of the Rolls* had no doubt but that this general agreement had been a sufficient bar of dower, provided it had been sufficiently expressed or proved that it was so agreed.

Another case is *Davila v. Davila*, 2 *Vern.* 724, before Lord *Cowper*. Covenant, in consideration of the intended marriage and £1000 portion, to pay his wife, if she survived him, £1500 in a month after his death, in full of dower; thirds by the custom of *London*, or otherwise, out of his real or personal estate. The husband died intestate, without issue, and the widow brought a bill against the administrator, to have a moiety of the personal estate by the Statute of Distribution; to which this covenant was pleaded by the administrator, and that he was ready to pay the £1500; and Lord *Cowper* allowed the plea, and said, "that possibly the husband might think it not necessary to make a will, and devise the estate to the next of kin, because he knew his wife was barred by the agreement;" against that decree there was no complaint or appeal.

I have already alluded to a number of cases of jointures out of the funds; many must have been on infants.

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What confusion might not this introduce in families, if parties were to be left to their legal rights? These cases \* were so frequent in courts of equity, that reports, and even notes, ceased to be taken of them.

But it has been said, the agreement in the present case was originally vicious, by reason of particular defects in it: that nothing certain is contained, no particular lands specified, and no remedy for the wife to compel the husband in his life. But the cases I have mentioned, and also the case upon Lord *Lechmere's* marriage articles, where it was only a general covenant, are all answers to the objections. And besides, there are two other answers. 1st, If there had been danger of Sir *T. Drury's* dissipating, and he had spent this equitable jointure, that would have been an eviction in equity, and consequently would have given her right to dower, like the case of an eviction at law; for equity pursues the reason of the law. 2dly, But he could not have spent it, *i. e.* not his real estate; for, if any one was about to purchase, he would certainly have asked whether Sir *Thomas* was married, if his lady was jointured, and when this was produced would have seen a settlement, or insisted on a settlement being made, or that the wife should join in a fine.

Another objection was, that the covenant is too short, but the agreement is general, whereas the covenant is, that his heirs, &c. after, &c. shall pay: therefore, that as there is no covenant for himself, there was no remedy to compel him in his lifetime. But I differ from that: for I think, upon the first clause, that she might by her next friend have brought a bill to compel him, because it is a general agreement, that she should have the annuity for, and in the name of, her jointure, which are the proper legal words, and the language of pleading. Then, has he not covenanted in every circumstance to make a

jointure, one property of which is to take effect immediately in possession on the death of the husband, which could not be unless it was settled in the life of the husband?

Another objection was, that this was an adequate jointure; a hard bargain. But this is a clear annuity of £600 [here his Lordship mentioned the lady's circumstances].

I cannot conclude this head without resorting back to the long established course of the Court of *Chancery* in the case of infants, who are under the care of that court. Many came before me whilst I sat there, in families of the first quality.

One I particularly remember, which I would mention, because it includes my great predecessor. The Duke of *Hamilton* married Miss *Spencer*, who had £40,000 in money, and a considerable real estate. There was a reference to the Master for the Duke to make proposals: the report being defective, it was sent back; and then it came before me, and I concurred in it.

But it is objected, that the Court of *Chancery* does no more than the father or guardian, the best it can, but the infant has the same privilege to waive when she comes of age. When this was the only answer given by so able an advocate as the *Solicitor-General* (a), I conclude it unanswerable; for this is no answer at all. It is saying no more than that this great court draws in and deludes families. People think, when they resort to that court in respect of infants, that it has a sovereign jurisdiction for what they do, and that trustees and all are indemnified. And what is so done must be in the case of infants.

It is improper for me to mention my own precedents; but in this practice I followed a great example, Lord

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(a) Sir *Fletcher Norton*.



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*Nottingham* (and here his Lordship enumerated all the Chancellors, including Lord *Talbot*). Have they all concurred to draw in and delude families? If this should be law, every one of us deserved to have been impeached, as being guilty of the greatest abuse and delusion of families. Such a series of practice and precedents make the law. A great part of the common law is so. What, therefore might not be the consequence of overturning all this established course?

Then the inconveniencies of persons claiming under family settlements; remainder-men may have a third part of their estates torn from them, and the jointure perhaps go to another. Nay, purchasers for valuable considerations may be prejudiced, for they can have no relief if the woman is not bound. And no person of a great estate will be able to marry an infant, unless she finds surety to bar herself at twenty-one by a fine. Beauty, virtue, and merit, cannot always find such surety. If this decree should stand, it must stand irretrievably, for I cannot think how any statute could be devised to reform it. There was considerable difficulty in framing the statute of wills. But these cases are so various, it would be impossible to imagine all the cases which are fit to be cured, and which are not.

The second general point is, whether she is barred of her distributary share of the personal estate. This, as to the value, is the material point.

If any thing can be clear in equity, it is this: if such agreements are fairly entered into, they will be decreed. It is truly objected, that a proper statute jointure could not bar this. But yet, if such a jointure had gone on in such words, or to the same effect as those which have been used in the present case, it would have excluded her. I have seen many such precedents: some concern-

ing wives of citizens of London, where the customary right has been allowed to be barred by a jointure, and the wife is said to be compounded with.

\*2. *Vern.* 665, *Hancock v. Hancock*, where a wife of a freeman of *London* is compounded with before marriage; by having a jointure, though of land; she is taken as advanced, and the children shall have her moiety as if she was dead, 1 *Vern.* 6. *Love's* case. If this is allowed in such case of a custom, *à fortiori* in personal estate not within the custom; for in the case of the custom she has a sort of paramount right superior to her husband.

It is objected, that this arises from agreement; but that an infant cannot agree. But certainly an infant so near of age, wanting only two months, might bind herself as to personal rights. She was capable of devising away all her own personal estate. This is not so strong. It is not to deprive her of her own, but to exclude her of the contingency of any part of her husband's personal estate. And here he has in effect said, so far I make my will already, that you shall not have any part of it.

All these contracts are looked on to be for the benefit of the husband and his family, that if he dies intestate, his children or family, and not his wife, should have his personal estate. See the case of *Davila v. Davila*, before cited, and Lord *Cowper's* reasoning at the end of the case; that the husband might think it not necessary to make a will, because he might consider his wife barred by the agreement.

A contrary construction would be to make this adult infant commit a fraud upon her husband, by claiming in contradiction to the articles. But minors are not allowed to take advantage of infancy to support a fraud. There was a decree by Lord *Cowper* (analogous to the case in 2 *Leo.* 108, of *Piggot v. Russel*), where tenant in tail applied to borrow money on a mortgage,\* the attorney's clerk who

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ingrossed the deed was the issue in tail, was then about the age of eighteen, and knew of his being issue in tail, but took no notice of it. Lord *Cowper* relieved against \*this minor, and would not suffer him to take advantage of his own fraud (a).

In this case I must take it Sir *Thomas Drury* relied on this agreement, and therefore made no will, and otherwise that he was drawn in and deceived.

Lord MANSFIELD.

The general question is, if Lady *Drury*, having the provision stipulated for her by her marriage articles, is not barred of her dower. I entirely agree with the Noble and Learned Lord who spoke last, that a jointure is not a contract, but a provision made by the husband, &c., as defined by Lord *Coke*, and therefore, that the consequence drawn from an infant's incapacity of contracting is ill founded. I must also deny what has been advanced in the argument of the present case, that either by the law of *England*, or any other law, every contract made by an infant is void; [here his Lordship cited the words of the *Edictum perpetuum de Min. tit. 4.*] *quod cum minore gestum esse dicitur, uti quæque res erit, animadvertas.*

By our law some agreements bind absolutely, some are void, some are voidable. Contracts for necessaries, such as diet, education, &c. are good (*Bac. on Uses versus finem*), and the infant's body liable to be taken in execution for them. So of a sum advanced for taking an infant out of gaol. Infancy never authorizes fraud; as, if goods were delivered to an infant, and he embezzle them, trover would lie against him; or if he took an estate, and was to pay rent for it, he

(a) Vide next note.

should not hold the estate, and defend himself against payment of the rent, by pretence of infancy. If an infant pays money with his own hand, without a valuable consideration for it, he cannot get it back again. If he receives rents, he cannot demand them again when of age. In *Watts v. Haiswell* and *Treswick (a)*, where the issue tail being eighteen years old, himself ingrossed the mortgage deed made by his father, and did not discover his right to the mortgage, Lord *Cowper* held him bound thereby, because, being of years of discretion, he had acted dishonestly in not discovering his title, and expressed his assent to the rule that had been laid down, of infants deriving their protection from those they contracted with, i. e. from the nature of the contract, if fair or otherwise.

Were infants not bound by such agreements as this, no lady could marry under age without her father or some near friends becoming security that she would, when of full age, join in fine to bar herself of dower, which, if she should afterwards refuse to do, the husband must have his remedy for a collateral satisfaction against the heir of her father, or such next friend, which would make wild work. I approve the distinction taken by Mr. Justice *Wilmot* between infants contracting for conveying away something of their own, and where for barring themselves of a right which is a third person's.

Consider the agreement in this case, and what the circumstances of it are. It is an agreement for the infant's advancement. Marriage is so. What sort of a mar-

(a) This is the case of *Clere* v. *Earl of Bedford*, 13 Vin. Ab. 536. & cit. 9 Mod. 38. in *Watts v. Creswell*, 9 Vin. Ab. 415. The infant was only a witness, and yet was postponed. See, as to this, *Mocatta v. Murgatroyd*, 1 P. W. 393. *Beckett v. Cordley*, 1 Bro. C. C. 353. *Cory v. Gertchken*, 2 Mad. Rep. 40.

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riage? With the consent of her father or guardian. Lady *Drury* was then nearly twenty-one: there is no objection to the fairness of the transaction. She had only £2000 for her fortune; it was an advantageous bargain for her at the time.

Better terms may be obtained for infants by parents and guardians than when they are of full age: by much the greatest number of women are married when under age: but they are not thereby to be made an instrument to defraud others, for there is no difference in effect whether the fraud be premeditated, or the circumstances by subsequent events be turned into fraud. If the statute of *Hen. 8.* had never been made, courts of equity would have given relief; but I am clearly of opinion that infants are barred under that statute. That act was made for uses, not for jointures: this is a provision arising out of the general consequences of uses.

Consider also the usage and transactions of mankind upon it: the object of all laws, with regard to real property, is quiet and repose. As to practice, there has almost been only one opinion. The greatest conveyancers; the whole profession of the law; Sir *Orlando Bridgeman*: Lord *Nottingham*: there was not a doubt at the bar in *Harvey v. Ashley*: Mr. *Faxakerley* always took it for granted that infants were bound.

If this decree were to stand, marriage settlements would be totally subverted without the interposition of the legislature; and I concur with the noble and learned Lord, that no man living could draw such an act of parliament. I will never put such an exposition on the law, as to make it necessary to apply to parliament to rectify it.

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It was ordered that so much of the said decree complained of by the said appal, whereby an account is

directed of the personal estate of the intestate, Sir *Thomas Drury*, &c. be affirmed, and that the residue of the said decree should be reversed; and it was declared, that the respondent is bound by the agreement entered into in consideration of, and previous to, her marriage with the said Sir *Thomas Drury*, and that the same ought to be performed and carried into execution, and that the respondent is thereby barred of her dower, and of any share of the said Sir *Thomas Drury*'s personal estate under the statute for distribution of intestate's estates.

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This important question was thus, after much difference of opinion, finally settled. Great doubts have however been entertained as to the propriety of the decision of the *House of Lords*. Lord *Thurlow* (as observed by Lord *Eldon* in *Milner v. Lord Harewood*, 18 *Ves.* 275) is said to have expressed himself strongly in favour of Lord *Northington*'s opinion.

The result of subsequent authorities is, that an infant cannot be bound by any article entered into during her minority as to her own real estate, which nothing but her own act, after the period of majority, can fetter or affect: that she may be barred of her right to dower by any provision, by way of jointure, if competent and certain, and her interest in money bound by agreement on marriage, since otherwise the husband would be absolutely entitled: but if the provision be precarious and uncertain, as where an estate for life was previously limited to another person, or where it was agreed that the husband's estate should go according to the custom of *London*, she will not be barred of dower. *Durnford v. Lane*, 1 *Bro. C. C.* 106. *Williams v. Williams*, *ib.* 152. *Slocombe v. Glubb*, 2 *Bro. C. C.* 545. *Creswell v. Byron*, 3 *Bro. C. C.* 362. *Williams v. Chitty*, 3 *Ves.* 545. *Caruthers v. Caruthers*, 4 *Bro. C. C.* 500. *Smith v. Smith*, 5 *Ves.* 189. *Clough v. Clough*, *ib.* 717.3 *Woodes*, 453. n. *Simpson v. Gutteridge*, 1 *Mad. Rep.* 609.

9th June,  
1761.  
S. C.  
Amb. 399.

## D'AQUILA v. LAMBERT.

(Reg. Lib. A. 1760. fol. 330.)

Where consignee becomes insolvent, consignor has a right to stop the goods at any time before they come to his hands.

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THE plaintiff, who was a merchant at *Leghorn*, on the 21st of *September*, 1759, shipped a large quantity of goods by direction of the defendant, *Israeli*, who resided in *England*, and consigned them to him, and drew bills of exchange for the money, which were accepted by *Israeli*. On the 16th of *November*, 1759, *Israeli* stopped payment, the bills were protested, and on the 23d he executed an assignment of his effects to his creditors.

The plaintiff having revoked the consignment to *Israeli*, consigned the goods to his factor, *Montefiori*, who, upon the arrival of the goods in the port of *London* in *December*, applied for them to the captain, who being also applied to by the agent for the creditors of *Israeli*, refused to deliver them till the right had been settled. This was a bill by the plaintiff to have the goods delivered.

The *Attorney-General*, and Mr. *Comyn* for the plaintiff.

The consignor may stop the goods at any time before they get into the hands of the consignee, in case the consignee is in such circumstances as not to be able to pay for them. *Wiseman v. Vandeput*, 2 Vern. 203, and *ex parte Wilkinson* in Chancery, 21st of *March*, 1755. In the latter case wines were consigned from *Lisbon* to a merchant in *London*. The wines were brought to *Lynn*, and the consignee becoming bankrupt, the agent for the consignor stopped the wines there, and held he might do so at any time before they got into the hands of the consignee; and that case was said to differ from *Wiseman v. Vandeput*, as the consignee ran a great risk by reason of the voy-

age. But Lord *Hardwicke* said, as there was no possession in the bankrupt, no appearance of credit on the goods, nor any payment made, the agent had a right to stop them. The principle is the same as in the cases of real lien. *Chapman v. Tanner*, 1 *Vern.* 267.

The *Solicitor-General* for the defendant.

This is not one of those cases where a court of equity will interpose against the legal right, which is most clearly in the consignee: such an interposition would shake credit, and entangle all the dealings of merchants. The ship sailed on the 16th of *September*, and did not arrive till *December*, so that the insolvent stood the risk two months. The delivery and possession are material circumstances in all cases of this kind. The goods having been delivered to the captain, he was bound, in point of law, to answer them to the consignee. If they had been lost in the voyage, it was the loss of the consignee. *Evans v. Martlet*, 1 *Lord Raym.* 271. Whatever determination the court has made upon particular circumstances, it has never declared, on a general case, that the consignor has a right to stop the goods at the delivering port; and in a case where there was no commission of bankruptcy, but only a trust deed for creditors, as in the present case; the present case differs from *Wiseman v. Vandeput*, as the goods were stopped in that case before the voyage began.

*The Lord Chancellor.*

This is a question of extent and consequence in trade, Had it been *res integra*, I should have required a more extensive argument, and taken time to consider; but after former determinations, and the satisfaction those determinations have given, it seems a case of no great difficulty. The plaintiff is substantially to be considered

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as a merchant selling goods to *Israeli*. The case of *ex parte Wilkinson* is in point. It was determined, on solid reasons, that the goods of one man should not be applied in payment of another's debts: I must therefore decree the goods to be delivered to the plaintiff on payment of the insurance.

The right of Stoppage *in transitu* was first recognized (in the present case, and the cases which are here cited) by Courts of Equity: it was soon, however, upon the same principles of justice, adopted in courts of law. The extensive mercantile transac-

tions and insolvencies of modern times have swelled the doctrine upon the subject to such a size, as to render it impossible to comprise it within the ordinary limits of a note. The reader will find it collected in the 18th Chapter of *Eden's Bankrupt Law*.

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The principle that where two distinct estates are mortgaged for two distinct debts, a separate redemption cannot be decreed, operates as long as the equities of redemption remain united in the same person.

*6 ap ca 74b.*

WILLIE v. LUGG.

(Reg. Lib. B. 1760. fol. 351.)

By indenture, bearing date the 29th of November, 1735, *Samuel Willie*, in consideration of *Mary*, his wife, selling her separate estate in order to purchase certain premises called *Dixon's Farm*, settles the same (subject to a term of 500 years, which had been created by indenture of the 10th December, 1734, to *Robert Dixon*, to secure £350) to a trustee, to pay the rents and profits to his said wife for life, remainder according to her appointment.

*Samuel Willie* was seised in fee of two adjoining estates

called the *East* and *West Dales*, and as he and his wife afterwards found it convenient to sell a part of *Dixon's Farm*; by indenture, bearing date the 10th of *December*, 1735, the *West Dales* were settled to the use of the husband and wife for life; remainder to the issue of their bodies; remainder to their right heirs: the *East Dales*, in the same manner as *Dixon's Farm*, had been subject to the mortgage to *Robert Dixon*.

By indenture, bearing date the 29th of *October*, 1750, *Dixon* assigned *Dixon's Farm* to *Adam Lugg* as a security for some money due to him.

The bill was brought by Mrs. *Willie* against *Lugg*, and the executors of *Dixon*, who was dead, to redeem the *East Dales*.

Mr. *Perrott* for the plaintiff; the *Attorney-General* for the executors of *Dixon*.


It is a rule of this court, too firmly settled to admit of discussion, that where a man makes two mortgages on different estates to the same person, he shall not redeem separately; and this doctrine is extended to the heir of the mortgagor, and by a still further stretch of the rule, even where one of the estates is entailed. *Margrave v. Le Hook*, 2 *Vern.* 207. But in all these cases the mortgage must be to the same person. There is a great difference, either where the mortgages are originally made to different mortgagees, and the mortgages come together by assignment, or where the different mortgages are assigned to different persons; the equities remain distinct. Mrs. *Willie* is in the same situation as a purchaser buying one of two estates subject to a mortgage, who has a right to redeem separately.

The *Solicitor-General* for the defendant *Lugg*.

If the husband and wife had been co-plaintiffs, they would have been tied to a general redemption. She has by her agreement made the whole estate liable for the

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whole debt. The circumstances are not sufficient to take the case out of the general rule.

*The Lord CHANCELLOR.*

This bill is brought to redeem the *East Dales*, and to leave *Dixon's Farm*, now reduced in point of value by the mortgagees selling a part for the benefit of the plaintiff, who had the inheritance. The question is, whether she can come into this court for such an equity.

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Every mortgagee, when the mortgage is forfeited, has acquired an absolute legal estate. Upon what terms can this court proceed to a redemption? By giving the mortgagee the value of his money, its fruit, and his costs, and upon those terms only: for it is obvious injustice to help to the restitution of the pledge, without a full restitution of what it is first pledged for. If a person makes two different mortgages of two different estates, the equity reserved is distinct in each, and the contracts are separate: yet if the mortgagor would redeem one, he cannot; because if you come for equity you must do equity; and the general estate being liable to both mortgages, this court will not be an instrument to take illegally from a mortgagee that by which he will be defrauded of a part of his debt.

I cannot see any difference between that case and the case at present under consideration; for the principle upon which the court proceeds subsists as long as the equity of redemption remains united. If you come to redeem separately, you come for equity without doing equity; paying a debt, in lieu of which the mortgagee can hold both your estates until this court interposes.

There seems also a manifest distinction between this case and the case of a purchase subject to a mortgage; for there the purchaser acquires a right to redeem that particular mortgagee, and when he comes to redeem,

he offers to equity to pay all that his estate is a debtor for (a).

Bill dismissed without costs.

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(a) The rule, however, laid down in the old cases, *Purefoy v. Purefoy*, 1 Vern. 26. *Shuttleworth v. Lanwick*, ib. 245. *Margrave v. Le Hooke*, 2 Vern. 207. *Pope v. Onslow*, ib. 286. (the authority of which, however, was doubted by Lord Hardwicke in *ex parte King*, 1 Atk. 300.) *Ex parte Carter*, Amb. 733. *Roe v. Soley*, Bl. Rep. 726. that a mortgagor of two distinct estates, upon distinct transac-

tions, to the same mortgagee, cannot redeem one without redeeming the other, seems, by modern decisions, to have been extended to a purchaser of the equity of redemption of one of the mortgaged estates, without notice of the other mortgage. *Cator v. Charlton*, cit. 2 Ves. jun. 377. *Collet v. Munden*, cit. ib. *Ire-son v. Denn*, 2 Cox, 425. *Et vide Jones v. Smith*, 2 Ves. jun. 372.

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1804. 2. 3. 1901. 2. 263.  
STANHOPE v. EARL VERNEY.

(Reg. Lib. B. 1760. fol. 242.)


HENRY SAYER being seised in fee of the manor of *Biddlesden*, in the county of *Bucks* (subject to an out-standing term of 1000 years, created 23d January, 1661,

the trust of it in favour of a second incumbrancer without notice of the prior mortgage, held to give him an advantage over the first incumbrancer, which a Court of Equity would not deprive him of.

The person claiming under such second incumbrancer, upon purchasing the equity of redemption from the mortgagor, was held not to have relinquished such advantages by having covenanted to retain part of the purchase money to redeem the prior mortgage, as it was also agreed that he might use the money adversely in case he could not adjust the matter amicably.

24th, 25th, 26th  
& 27th June,  
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Cit. *Butler's n.*  
*Co. Lit.* 290 b.

The custody of the deeds creating a term, accompanied by a declaration of

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which was vested in *Rigby* and *Eyre*), by indentures of lease and release, bearing date the 4th and 5th days of *June*, 1732, conveyed the said manor of *Biddlesden*, together with all his lands, tenements, and hereditaments in *Biddlesden*, not in jointure to his wife, to Lady *Dysart* and her executors, administrators, and assigns, for the term of 1000 years, for securing the payment of £1000. And by a deed-poll of the same date, reciting, that the title deeds of the said premises belonged to several other very valuable estates in the county of *Bucks*, and that he was desirous of having possession of the same, he covenanted to produce them when required thereto.

By indenture, bearing date the 8th of *June*, 1732, *Rigby* and *Eyre* assigned the term to *Cunningham* and *Clayton* in trust for *Henry Sayer*, his heirs and assigns.

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By indentures, bearing date the 18th and 19th of *December*, 1732, *Henry Sayer* conveyed the same estates to Mrs. *Nash*, her heirs and assigns, by way of mortgage for securing to her £3000, with declaration that *Cunningham* and *Clayton* should stand possessed of the said term in trust for her. The deeds respecting it were delivered to her, and neither she nor the trustees had notice of the mortgage to Lady *Dysart*. This mortgage was afterwards assigned to Sir *James Lowther*, who advanced a further sum of £1000, and a similar declaration of trust was made as above.

By indentures of lease and release, bearing date the 9th and 10th *July*, 1752, *Henry Sayer*, the grandson of the said *Henry Sayer*, sold the premises to Earl *Verney*, who took an assignment of the mortgage of Sir *James Lowther*, and the term was assigned to *Harris* as trustee for Lord *Verney*, to attend the inheritance. By an indenture of even date, it was agreed between Mr. *Sayer* and Earl *Verney*, that the latter should retain the sum of £2392 out of the purchase-money, which should be

applied in purchasing and redeeming the lands in possession of Lady *Dysart's* representatives, in case they should, within ten years, voluntarily convey them to the said earl; and in case they should not so voluntarily convey, that he might use the said sum of £2392 in maintaining actions at law, or suits in equity, for obtaining the same; and that for such lands so obtained the said earl should pay twenty-six years' purchase.

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Lady *Dysart's* personal representatives had brought ejectments for some parts of the premises, and had recovered and received possession; and now having brought ejectments for the other parts, and Earl *Verney* having defended, and set up the term, with a declaration of trust, the present bill was brought by the representatives for an assignment of the term to protect the mortgage.

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The *Attorney-General* and Mr. *Willes* for the plaintiffs.

The first question in the present case is, whether the plaintiffs are not entitled to an assignment of this term; the mere custody of a deed creating a term gives no benefit without an assignment, and Lady *Dysart* had here an equitable interest equivalent to an assignment. The second point is, that Mrs. *Nash* and Sir *James* have postponed themselves, by suffering Lady *Dysart* to proceed while cognizant of her title. It is like the case of *Willoughby v. Willoughby* (a), where Lord *Hardwicke* considered the circumstance of notice as taking away from a puisne incumbrancer the benefit he otherwise might have had by the assignment of a term. In the present case Lord *Verney*, by retaining part of the purchase-money, has affected himself with notice, and corroborated and confirmed Lady *Dysart's* mortgage.

(a) 1 T. R. 763. 1 Collect. Jurid. 337.

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This court cannot take away a priority from a *bonâ fide* purchaser, who is entitled to call for the term ; for where terms are created to attend the inheritance, they will attend the particular estates created out of the inheritance. The covenant to Lady *Dysart* to produce the deeds is no lien, on the contrary, it is evidence that there was no reliance on the term. The fact of notice cannot affect Lord *Verney*, for it was decided by Lord *Talbot*, in *Lowther v. Carleton*, *Ca. Temp. Talb.* 187. that notice to one who purchases from a purchaser without notice, cannot invalidate the second purchase.

*The Lord CHANCELLOR.*

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This is one of those cases which are always very honourably laboured by the counsel at the bar, and determined with great anxiety by the court, as some of the parties must be shipwrecked in the event.

The case is in effect this : on the 5th of *June*, 1732, Mr. *H. Sayer* was seised of the inheritance of an estate, which I will describe by the words used in the first mortgage, "the estate not settled in jointure;" but this was subject to the remainder of a long term vested in *Rigby* and *Eyre*, who were likewise trustees of the other part of the premises which were settled for the remainder of the same term.

Mr. *Sayer* applies to borrow £1000 of Lady *Dysart* upon the inheritance, and on Lady *Dysart's* applying for the title deeds, as they related to both the estates, the trustees refused them ; and Mr. *Sayer* covenanted for himself and the trustees to produce the title deeds as occasion should require, and, *inter alia*, the original term of 1000 years : so that the lady concluded with taking a mortgage of the inheritance subject to the 1000 years

term, and with no contracted-for equity, or any thing but an equity resulting as to a particular tenant of the inheritance.

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Upon the 8th of the same *June* Mr. *Sayer* procured from *Rigby* and *Eyre*, the assignees of the 1000 years term, an assignment to two trustees nominated by himself, *Cunningham* and *Clayton*, as absolute owner of the beneficial interest of the term, and the inheritance and the trust is declared to him, his heirs and assigns.

Mr. *H. Sayer*, standing in this situation, 19th *December*, 1732, mortgages this estate to Mrs. *Nash* for £3000, and this is done by a conveyance of the inheritance with a declaration of trust by *Sayer* for the benefit of Mrs. *Nash*; and Mr. *Clayton*, one of the trustees, prepares and attests the lease and release.

Now the only material question is, whether Lady *Dysart* acquired such an equitable interest in the term as was equivalent to an assignment of the term, or a merger of the term in the inheritance: for if this court says that she acquired an equity which (to use a legal expression) would run with the land, it makes an equity resulting from one trust, and particular trustees immutable and eternal; a position which would unfix the polar star of equity, "that a purchaser for a valuable consideration, being in an ability to defend himself at law, cannot be hurt by a court of equity."

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For there is not a case to be put of a contest between two purchasers, where the first purchaser, by paying his money, does not get an equity; and that equity, if free from fraud, stands with a priority in this court, according to the time of its creation, so that the nature of the equity continues the same; but a purchaser without notice for a valuable consideration, is a bar to the jurisdiction of this court, and it is of no consequence when the legal advantage was acquired, if the purchase was made, and the



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money paid without notice. For if Mrs. Nash had left the assignment from *Rigby* and *Eyre* to *Cunningham* and *Clayton*, either in the hands of Mr. *Sayer*, or of *Cunningham* and *Clayton*, and a subsequent mortgage had been made with an assignment of the term, she would not have been in any better condition than Lady *Dysart*.

The result therefore in solid sense and justice is this : the value of an equity, while it subsists as an equity, can only be fixed by the accident of notice ; for if the trust is changed upon a purchase, and the term assigned to new trustees, or the term delivered over to the purchaser, with a new declaration of trust, which I must take to be this case, there I must look upon the trust and equity as consolidated and united, and that the *cestuy que trust* and trustees are one.

I am therefore of opinion, upon this point, that I cannot, consistently with the rules and maxims of this court, or without taking lands *e commercio*, relieve the plaintiffs: for no man can purchase lands but by advice of counsel, and if you cannot safely purchase with the legal estate, counsel cannot advise you, and you cannot purchase at all.

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As to the second point, it appears that Lord *Verney* bought, and intended to buy, the entire estate; but there being a dispute as to the title of part of it, a sum of money is retained to be applied in purchasing and redeeming Lady *Dysart's* representatives ; but with an express proviso for Lord *Verney* to use it for the recovery of those premises adversariously, in case it could not be adjusted amicably, and by treaty; which makes it clear to me, that Lord *Verney* intended by that transaction to stipulate with Mr. *Sayer* only for what he thought would be a reasonable satisfaction for Lady *Dysart's* representatives, under the circumstances of her security, without

any intent to relinquish any advantage he had got by his securities.

I must therefore either dismiss the bill, or the plaintiffs must accept £2392, and deliver possession to Lord Verney forthwith.

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It is observed by Lord Eldon in *Maundrell v. Maundrell*, 10 Ves. 271. that a subsequent incumbrancer without notice, cannot protect himself by a satisfied term against a prior incumbrancer, unless it be in some sense got in; either by taking an assignment, or making the trustee a party to the instrument, or taking possession of the deed creating the term. Upon the point of notice there is a distinction in the case of a dowress, that notice of her title shall not protect her where the purchaser has ob-

tained an assignment of the term; a distinction founded not on principle, but the practice of conveyancers found to be inveterate. *Lady Radnor v. Vandebendy*, Show. P. C. 69. Prec. Can. 65. *Swannock v. Lyfford*, Butl. n. Co. Lit. 208 a. 2 Atk. 208. *Amb.* 6. but which was refused to be extended to the case where a purchaser has omitted either to procure an assignment, or declaration of trust, or possession of the deed. *Maundrell v. Maundrell*, 7 Ves. 567. affirmed on appeal. 10 Ves. 246.

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10th & 23d Nov.  
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S. C.  
Sewell, MSS.

## EARL OF BUTE v. STUART.

(Reg. Lib. A. 1761. fol. 22.)

Testator having by his will made his daughter tenant for life of his general real estates, and of lands to be purchased, both with his personal estate, and with the profits arising from sale of timber, devises his collieries, &c. upon trust to dispose and convey the same in such manner as she, whether sole or covert, should direct or appoint; and in default of appointment, to apply the money produced by the collieries, after paying the expenses, to the same uses as the residue of his personal estate: the testator then, after declaring, that though his meaning was to give his daughter the absolute disposal of the said collieries, &c. to prevent the expenses and trouble that must attend the management of affairs of such a nature under the direction of the Court of Chancery, requested her to direct the money arising therefrom to be applied in such manner as he had directed the same in default of appointment: held, that from the general frame and intent of the will, the daughter had not the absolute disposal of this property, but that her interest was confined to a disposition by sale.

EDWARD WORTLEY, Esquire, by his will, dated the 23d of May, 1755, gave and devised all his manors, lands, tenements, mines opened and unopened, and hereditaments in the West Riding of the county of York, and also his freehold estate in *Tintagel*, in the county of Cornwall (subject to an annual rent-charge of £1200 to the Lady Mary Wortley, his wife, and of £1000 to his son, Edward Wortley, for their respective lives, and to certain other annuities) to, and to the use of Earl Gower, Sir Matthew Lamb, and Godfrey Wentworth, Esquire, and their heirs, upon trust, to permit his mansion-houses, with the appurtenances in the West Riding of the county of York, to be held and enjoyed by his daughter, the Countess of Bute, for life, and upon trust, to pay the rents and profits of the residue of the premises to her for her separate use; and after her death, in trust, to pay the rents and \*profits of all the premises into the proper hands of his son Edward Wortley; and after his death, in trust, for the first and other sons of the said Edward Wortley, by any woman he should then after marry, successively in tail male: and for want of such issue, in trust for the second and other sons of the testator's said daughter, Lady Bute,

successively, in tail male (except her first son), with remainder to her first son in tail male ; with remainder, in trust, for the first and other daughters of the said *Edward Wortley*, by any woman he should then after marry, successively in tail general ; and for want of such issue, in trust for the testator's own right heirs.

The testator empowered his trustees, and their heirs, yearly, during the respective lives of his said daughter and son, to cut down for building and repairs, and also for sale, such timber on his estate in the West Riding of *Yorkshire* as they should think fit, leaving the usual stock of young timber ; and directed that out of the money arising by such sale of underwoods, his trustees should pay to his said daughter the yearly sum of £300 for her life, for her separate use ; and should after her death pay the like annuity to his said son, and apply the surplus thereof in the purchase of lands, tenements, and hereditaments, in the West Riding of the county of *York*, to be conveyed and settled to the same uses as his estate in the said West Riding was thereby devised and settled.

He then gave (subject to an annuity of £600 a year to the said *Edward Wortley*, his son, for life) all his manors, lands, tenements, mines, opened and unopened, and hereditaments, in the North Riding of the said county of *York*, and in the counties of *Nottingham*, *Devon*, and *Cornwall* (except his estate in the parish of *Tintagel* in *Cornwall*), unto the said Earl *Gower*, Sir *Matthew Lamb*, and *Godfrey Wentworth*, and their heirs, in trust, to pay the rents thereof to the said Countess of *Bute*, his daughter, for her life, for her separate use ; and after her decease, in trust for her second and other sons successively, in tail male (except her first son) ; remainder to the use of her first son in tail male ; remainder to the use of her first and every other daughter successively, in tail general ; remainder in trust to pay the rents and profits

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thereof into the proper hands of the testator's said son ; remainder to the use of the first and other sons of his said son which he should have by any woman he should then after marry, in tail male successively ; remainder to the use of the first and other daughters of his said son by such wife successively, in tail general ; remainder in trust for his, the testator's, own right heirs.

He then gave and bequeathed all his ready money, securities for money, stocks in the public funds, and all other his goods, chattels, and personal estate (except such parts thereof as he, by his will, otherwise gave and disposed of), to the said Earl Gower, Sir Matthew Lamb, and Godfrey Wentworth, their executors, administrators, and assigns, in trust, in the first place to pay his debts, legacies, and funeral charges, and subject thereto, he directed that his said trustees, their heirs, executors, and administratorss, should from time to time, as they should think proper, lay out and apply the residue of his said personal estate in the purchase of lands, tenements, and hereditaments, in the said West Riding of the county of York, in fee-simple in possession, to be conveyed to the same uses as his estate in the said North Riding of the county of York was by his said will devised and settled ; and further directed that until such purchases should be made, his said trustees should place out the said residue of his personal estate on real or personal securities, and not on the public funds, or government securities, and apply the proceeds thereof to such persons as would be entitled to the profits of the land if such purchases were really made.

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The testator also gave all his collieries and coal mines, and all his estate and interest therein, and all his shares in collieries and coal mines, and all his stock in the coal trade, and his vessels, ships and boats, and all his lands, tenements, hereditaments, goods and chattels in the coun-

ties of *Northumberland* and *Durham*, unto the said Earl *Gower*, Sir *Matthew Lamb*, and *Godfrey Wentworth*, their heirs, executors, administrators and assigns respectively, upon trust, to convey and dispose of the same in such manner as the said Countess of *Bute*, his daughter, whether sole or covert, should direct or appoint by any writing or writings under her hand and seal in the presence of three credible witnesses; and in default of such direction or appointment, upon trust, for the managing and carrying on the coal trade in partnership with his partners therein; and for that purpose he thereby authorized and empowered his said trustees, their heirs, executors, administrators and assigns, to sell all or any of his lands, tenements and hereditaments, in the said counties of *Northumberland* and *Durham*, when and as they in their discretion should think fit, and to apply the money arising thereby, and the rents and profits thereof, in the mean time, in and for renewing the leases of the present collieries or coal mines; and in taking to farm, or purchasing any other collieries or coal mines, or any lands that lay convenient for ways or way-leaves, and for the doing all other acts requisite and proper for the carrying on and managing the said coal trade, in as full and ample manner as he, the testator, could do, and as they, his trustees, should think most for the benefit of his estate. And he declared his will to be, that his said trustees, their heirs, executors or administrators should stand possessed of, and interested in, the clear money which should arise and be produced out of the said collieries or coal mines, and other his real and personal estates and effects in the said counties of *Northumberland* and *Durham*, thereby given and devised to them as aforesaid, in trust to apply and dispose of the same in such manner and for such purposes as the residue and.

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surplus of his personal estate was thereby directed to be applied as aforesaid. And he declared, that although his meaning was to give his said daughter the absolute disposal of the said collieries, and the premises relating to the same, and of his lands, tenements and hereditaments, in the said counties of *Northumberland* and *Durham*, to prevent the expenses and trouble that must attend the management of affairs of such a nature under the direction of the Court of *Chancery*, he requested his said daughter to direct the money arising therefrom to be applied in such manner as he had directed the same in default of her direction and appointment.

And the testator directed, that the several persons who for the time being should be entitled to his real estate, should take the surname of *Wortley*; and he gave to such of the daughters and younger sons of the said Countess of *Bute*, his daughter, except the defendant, or such other son who should, after his death, be entitled to his estate under the limitations of his will, the sum of £2000 each; and gave the like sum of £2000 to his said daughter, the Countess of *Bute*; and directed that £1500, part thereof, should be applied towards finishing *Wortley-Hall*, in the county of *York*, and £500, the residue thereof, towards furnishing the said house; and that the furniture thereof should be enjoyed with the house, as heirlooms, as far as the rules of law or equity would permit; and he appointed the said Earl *Gower*, Sir *Matthew Lamb*, and *Godfrey Wentworth*, executors of his will.

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In *January*, 1761, the testator died, leaving Lady *Mary Wortley*, his widow, and the defendant, *Edward Wortley*, his only son and heir, and the Countess of *Bute*, his only daughter. The plaintiff, and the Countess his wife, had issue between them, the Right Honourable *John Stuart*, commonly called Lord Viscount *Mount*

*Stuart*, their eldest son, and the defendant, *James Archibald Stuart*, their second son, and several other younger children.

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The Countess of *Bute*, by a writing or deed-poll, dated the 11th of *March*, 1761, appointed all the said collieries and coal mines, and all such stock in the coal trade, and all such vessels, ships and boats; and also all such lands, tenements, hereditaments, goods and chattels in the said counties of *Northumberland* and *Durham* which her late father was seised or possessed of, &c. unto the plaintiff, her husband, his heirs, executors, administrators and assigns, to and for his and their own use and benefit absolutely for ever.

The bill prayed a conveyance and assignment of the several messuages, lands, hereditaments and real estate, in the said counties of *Northumberland* and *Durham*, and all the messuages, lands, tenements, collieries, coal mines and hereditaments, in the said counties of *Northumberland* and *Durham*, which the testator was possessed of or entitled to at his death, either in his own right or in partnership with any other person, by virtue of any lease or leases under which the said premises were held, and might deliver up to him all the stock and utensils in the coal trade, wherein the testator was engaged at his death, &c.

The defendant, *James Archibald Stuart*, insisted, by his answer, that the said deed of appointment made by the Countess of *Bute*, his mother, in favour of the plaintiff, was void; and that she had no power, by virtue of the testator's will, to limit or appoint the collieries, estates and premises in question; for that although the testator had given such power of directing and appointing such estates and premises as in the will were mentioned, yet that such power was not absolute, but only a power *sub modo*, and connected with a trust, and controlled by a



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subsequent part of the will, wherein the testator requested his daughter to direct the money arising from the said estate and collieries to be applied in such manner as he had directed the same in default of her direction and appointment; and that such request ought to be deemed as directory, and construed as legatory words of trust, and ought to control the countess in the execution of such power in favour of such persons to whom the testator directed the same to go in default of her appointment; and that he, the defendant, was, by virtue of the said will, entitled thereto as tenant in tail on the death of his said mother, &c.

The *Attorney-General*, the *Solicitor-General*, Mr. *Wilbraham* and Mr. *Wedderburne*, for the plaintiffs.

The great value of the premises makes the principal difficulty and importance of the present question, which is, whether Lady *Bute* had an absolute dominion and propriety in this devise of the collieries, or stands in the nature of a trustee. As to the import of the word "request," although in common language it implies an absolute power and dominion in the person requested, yet according to the civil law, and in this court, it is always considered as mandatory; but the rule of construing such devises is, that where an ownership of the lands, or an absolute power of appointment is given uncontrolled by any express trust, though it may be accompanied with a request as to the dispossession, a court of equity will not presume that the testator intended to raise an implied trust inconsistent with the express estate. *Cary*, fo. 30, 31. [ 94 ] 1 Ch. Ca. 310. *Bland v. Bland* (a), *cor.* Lord *Hardwicke*, 1743. *Attorney-General v. Hall*, *Fitzg.* 314. In the present case there are express words which have

(a) Cit. in *Pierson v. Gar-* all the cases on this point are  
*net*, 2 Bro. C. C. 38. where collected.

conferred an absolute right of disposal. The trustees are charged, with particular directions, to convey and dispose as she should appoint; and she being a *feme-covert* could not exercise her powers of ownership in any other manner, or have taken so absolutely, as the greatest part of the property is leasehold. Her authority is general, subject only to a recommendation, but which could not raise any implied trust in her, because the testator himself declares that he has given the power to her "*in order to prevent the expense and trouble which must attend the management of affairs of such a nature under the direction of the Court of Chancery.*" These words must be considered as negating any intention that his request should be construed into a trust. In one place he directs the trustees to "convey and dispose as she should direct"; and in another he declares that he has "given her the absolute disposal." Such a power might be exercised by gift as well as sale, and amounts to the absolute ownership: the trustees are expressly prevented from acting, except in default of appointment.

The testator has evidently distinguished this from the other parts of his property; it was of a different nature, and therefore required a different sort of management: it was in the nature of a partnership adventure, therefore a very unfit subject to be in the hands of trustees. Great demands might arise, and large sums of ready money might be required to carry on the adventure; or he might consider it as a proper fund to answer the exigencies of the family in advancing sons or portioning daughters.

Mr. Sewell, Mr. Perrot, Mr. de Grey, Mr. Hoskins, and Sir Anthony Abdy, for the defendants.

It is a general question of the intent of the testator, whether Lady Bute was to have the absolute dominion

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and property in these collieries or not. The only general rule upon this subject is, that any man may devise by any words that will express his intent: take the general plan of the will, and it all speaks accumulation. Testator intended to make a new family out of grandchildren. The key of construction is his intention of a perpetuity; it is therefore clear that the general intent was, that the money and produce arising from it should be applied to the uses expressed in the will. Had the intent been to give an absolute interest, the subsequent directions to the trustees, in default of appointment, are absurd. The testator merely intended her a private trust: he was apprehensive that the trustees might be unwilling to execute the trust without proper indemnity, and thought that the choice of continuing to carry on the collieries, or to sell them, could be no where so properly lodged as in Lady *Bute*; he therefore gives her a power either to carry on the works, or to direct a sale, which he does not lodge in the trustees. But it does not follow from thence that he intends to give her the absolute dominion and property; on the contrary, the money arising from her appointment is expressly limited to go along with the estate. If he had meant it for her own benefit he would have expressed it so in precise terms, as he has done the other benefits which he has given her by the will. Wherever he gives her anything throughout the will, he expresses the same to be for her benefit, except in the clause in question.

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The Lord *Chancellor*, after the counsel for the defendants had finished, stated to the counsel for the plaintiffs some observations which had occurred to him as to the construction of the will; and adjourned the reply till

after the long vacation, that they might have full opportunity of considering the same.

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The *Attorney-General* in reply.

It has been stated on the other side, that the object of the will was to create a perpetuity. If such had been the sole intent of the testator, he has pursued very inadequate means to effectuate it; as where he might have made tenancies for life, he has made limitations in tail. There is not therefore evidence of intention to be drawn from the general frame of the will sufficient to control the particular clause. He distinguishes the collieries from the rest of his estate, as he did not mean to do the same with them; and he gives the reason, that if held in trust, and subject to this court, the expenses would be enormous; he therefore gives them to her absolutely. For the defendants it was laboured to shew what was not the testator's intent; but all the counsel differed as to what was the intent. They could not insist that it was a trust throughout. Mr. *Sewell* said it was a secret concealed trust; Mr. *Perrot*, that it was a power to indemnify the trustees; Mr. *de Grey*, that it was the testator's intention to give the power of managing the estate uncontrollable to Lady *Bute*. Then, by the last observation which fell from the court, it is said that there was a difficulty necessarily attendant on the trust, which Mr. *Wortley* wished to avoid, that he might either effect that by a beneficial gift to Lady *Bute*, or by directing a sale, with the option lodged in her, and an eventual trust after the sale was effected, and then it is said he chose the latter. From what words is that to be collected? The words of gift are absolute. Is it then from the words directing the employment of the money to arise from it? Why must they necessarily import a sale? If he had

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wanted a sale, how could he have missed using proper words to express that intention? But he was wholly averse to the sale of this part of his property, which, from its nature, could not produce a price adequate to the income it yielded.

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*The Lord CHANCELLOR.*

23d Nov.

This bill is brought by the Earl of *Bute*, as appointee of his Lady, on a claim derived under the will of her father, Mr. *E. Wortley Montague*, to have the trustees in his will, three of the defendants, to convey to the use of plaintiff, the Earl, the estate of Mr. *Wortley*, in the counties of *Northumberland* and *Durham*, collieries, coal mines, all the stock and utensils in the coal trade, vessels, ships, &c. and that they may account for rents and profits of the premises.

It was said by the counsel for the plaintiff, that the premises are of an immense value, and therefore the question of the greatest consequence to this noble family; and, indeed, that circumstance would in this case, as well as in some others, have brought a load on me under which I should have sunk, had I not to support me the consideration that, by the wise policy of our constitution, this is not a court of the last resort, and therefore that the judge can do no substantial injury to any subject who comes or is brought hither.

Mr. *Attorney* stated the question to be, whether Lady *Bute* had an absolute dominion over, and propriety in, these collieries and other premises, or stood in nature of a trustee? But as she had no legal estate in the premises, I don't see how she could stand in the nature of a trustee; and as Mr. *Wortley* had left her at liberty to appoint or not, she was not under *obligatio conscientiae ad intentionem alterius*. Therefore the truer and more simple question

seems to be this, Whether Mr. *Wortley* intended to empower his daughter to direct the trustees to dispose of the premises for her own absolute benefit, or without consideration, if she thought proper so to do? He certainly might have done so if he pleased, and that brings it only to a question of intention, which arises daily in this court, whose duty it is, as well as that of a court of law, to carry such intent into execution.

To find out the testator's intent, it is necessary in this case, as in others, to view the whole plan and scope of the will; and particularly to examine that part or clause from which the question under consideration now immediately arises.

The first principle of this will is founded on a predilection to his daughter, and in a general desire to disinherit his son, and to substitute Lady *Bute* as the root in his place, and to catch hold of every possible fund for accumulating a great landed estate for her second son. For though there is a reserve of part of the inheritance to the issue of the eldest son by any other wife than the present in the West Riding estate, yet Lady *Bute* is preferred to the testator's sons with respect to the freehold of that estate, charged with the annuities; and, perhaps, that contingent limitation was more from decency than a desire or expectation that it would ever take effect.

This estate in the West Riding was a wooded and timbered estate; he does not make Lady *Bute* tenant for life, subject to the charges with impeachment of waste; but lays his hands on these casual profits for a fund of accumulation, and giving thereout £300 *per annum* to his daughter for her life, directs "the residue of the money arising by sale of timber and underwoods, to be applied to the purchase of lands to be settled to the same uses of the estate." His estate in the North Riding, &c.

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he limits to the separate use of his daughter for life ; remainder to her second and every other son, with remainder over : then to his trustees all his money securities, goods, chattels and personal estate whatsoever, to pay his debts, funeral expenses, bequests and legacies, and “ subject thereto, to lay out the residue in the purchase of lands and tenements in the West Riding, to be conveyed when purchased, to the same uses and subject to the same provisos as his estate in the North Riding is hereby devised and settled ; and till such purchase, the interest and proceeds to be paid and applied as if the purchases were made.

“ He then gives all his collieries and coal mines, and his stock in the coal trade, and all his vessels, ships and boats, and all his lands, tenements and hereditaments, goods and chattels in *Northumberland* and *Durham* to his trustees, upon trust, to convey and dispose of the same in such manner as his daughter, whether sole or covert, should direct and appoint ; and in default of such appointment on trust, for managing and carrying on the coal trade in partnership ; and for that purpose he empowers and intrusts his trustees to sell his effects in the said counties at discretion, and to apply the money arising by sale, and rents, and profits, in renewing leases of the collieries, and farming or purchasing others or wayleaves, and in all other acts proper for carrying on the coal trade in as full and ample manner as he could do.

“ And his will was, that his trustees should stand possessed of, and interested in, the clear money arising from the collieries and coal mines, and other real and personal estate, and effects in *Northumberland* and *Durham*, hereby given to them as aforesaid, to apply the same for such purposes and in such manner as the residue of his personal estate is directed to go or be applied ; and although his meaning was to give his daughter the *abso-*



*lute disposal* of the said collieries and other premises in the counties of *Northumberland* and *Durham*, to prevent the expense and trouble that must attend the management of affairs of such nature under the direction of the Court of *Chancery*, he requested his said daughter to direct the money arising from the same to be applied in such manner as he had directed the same in default of her direction and appointment. He gives his fee-farm rents in *Sussex* to the second and every other son of Lady *Bute*, with remainders over. His leasehold estates in *Cornwall* to attend the freehold estate in *Tintagel*; his house at *Twickenham* to his trustees to be sold, and the money to be disposed of as the residue of his personal estate."

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I have here presented the skeleton of this will, and it appears indisputably (except in the case in question, the consideration of which I postpone), that in the disposition of this immense real and personal estate, the principal object of Mr. *Wortley* was that of every old and rich man, anxiety to make his wealth survive himself as long as possible, and that though in the arrangement of the particular estates, he preferred one before the other, yet he preferred the preserving his wealth unalienable to every thing else. For though by using technical words he has given a power of alienation, yet from the frame of the will, it is to be suspected, that it was occasioned either by the inattention of himself, or the person that drew the will. In the disposition of every branch of the real estate, his favourite object, the daughter, is only made tenant for life. Nay, in the West Riding that estate is contracted; the produce of a fall of timber and underwood was too much to intrust her with, and therefore, after wringing out £300, that is intended to be established as a perpetual fund of accumulation.

The residue of the personal estate is destined to the



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same purposes, and even the house at *Twickenham* is thrown into the aggregate fund, and Lady *Bute's* legacy of £2000 is not even subjected to her dominion and propriety, but £1500 is destined to finish the seat, the other £500 to furnish it. And besides, there are legacies of £2000 a-piece, together with maintenance, given to all her younger children.

But still it is insisted, that the collieries and estate in *Northumberland* and *Durham* are excepted from this general plan, and that they are given to her in full propriety, and at her absolute disposal. Pretty odd, for Mr. *Wortley* to say, "You shall have the dominion of this great treasure if you will give it away, but if it be retained and managed for the best, you shall only enjoy for your life the profits of the profits!" And the only motive for his departing from his general plan of settling and preserving, and his becoming on a sudden so generous, that I have been able to collect from the argument, was to prevent the trouble and expense of their management under the Court of *Chancery*. But this would be, in a tenacious man, *ne moriari, mori*. And a person of Mr. *Wortley's* sense and penetration might have discovered a medium more agreeable to the general plan of his will, and which, in several instances, he has pursued. I mean that of converting his property, where it stood under inconvenient circumstances, into a more simple species, as the purchasing of land capable of being settled in a course of particular estates. I am aware this will be objected to by asking, why then did he not give such a plain and express direction, especially as he has done so with respect to the timber, underwood, residue of the personal estate, and the house at *Twickenham*? and because he has not repeated the same thing in as plain and express a manner, it may be too hastily inferred that he designed it absolutely for his daughter.

But very little reflection will show that there is a strong distinction between the two cases, and that an express direction for a sale might be very well applied to the instances specified, and not at all adapted to the condition of the collieries; for all the other matters would go to an open market, and nobody could avail themselves, or prejudice his estate from a knowledge that they were directed to be sold. But perhaps (and it seems to me) the collieries stood on a very different bottom: there are few persons that could, and fewer that would purchase and become engaged in so extensive and intricate an undertaking, how beneficial soever it might be under a proper and prudent management. And therefore the purchasers might be confined to the number of surviving partners, or some few others conversant in that trade, who might make their advantage of an absolute direction for the sale of them. In such a case as this, a man of prudence might think it no improvident medium to lodge in some person a power to have them sold, and at the same time to arm the person with a power to carry on the trade in as full and ample a manner as he himself could. A person so intrusted was not subject to the disadvantage I have pointed out, and would be enabled, whenever a reasonable offer was made, to relieve the estate from the expense and trouble of being under the management of this court. From the general plan of Mr. *Wortley's* will, this might have been his intent, and would have been the most reasonable provision he could have made against the expense attending the taking directions and passing accounts in this court.

I will now consider, whether, from the particular part of his will, relative to these collieries, and the premises in *Northumberland* and *Durham*, this appears to have been his intent, or that he intended the absolute dominion for his daughter.

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It is first observable, that the absolute legal dominion of the premises is given to the trustees, who are to convey and dispose as Lady *Bute* should direct and appoint. Had the devise stopped here, Lady *Bute* would have had a power of appointment during her life, which, if she had failed to execute, the trust of the premises would have resulted to the testator's real and personal representatives. Mr. *Wortley*, supposing that she might not execute the power, immediately proceeds to a provision in default of such execution, which, if her power was to be as absolute as it is now contended to be, seems to be an absurd and unnecessary provision, since it was saying, if you execute the power you shall have the absolute interest in the premises; but if you do not, the perpetual mesne profits shall be from time to time invested in purchases. But Mr. *Wortley* foresaw that his daughter could not probably forthwith execute the power he had given. He therefore declares the trust immediately, and subjoins it, so as to take into the trust the whole profits from his death; for the words *in default* applied to a thing future, and not in existence, but commencing immediately.

It makes it therefore necessary to see what sort of conveyance he intended the trustees should make on the direction of his daughter, and this naturally draws up the last explanatory clause, and connects it with the first. "And although my will and meaning is to give my daughter the absolute disposal of the said collieries and premises relating to the same, and of my lands, tenements, and hereditaments, in the said counties of *Northumberland* and *Durham*, to prevent the expenses and trouble that must attend the management of affairs of such a nature in the Court of *Chancery*, I request my said daughter to direct the money arising from the same to be applied in such a manner as I have directed the same,

in default of her direction and appointment." That is, as the residue of his personal estate, in purchasing lands.

Now, as Mr. *Wortley* took notice that money was to arise upon the conveyance and disposal of the trustees, it seems to me, that he could mean only that they were to convey and dispose on a bargain and sale settled by his daughter, for as he supposed money to arise on that conveyance and disposal, so he supposes, as in truth it must be, that the money was to be received by, and lodged in, the hands of trustees; and therefore he does not request her to lay out or apply this money in the purchase of lands, but to direct the money to be applied.

If, therefore, the apparent intent of Mr. *Wortley* was, that the trustees were only to convey for money, that must be construed to be upon a sale, the terms of which were to be settled by the daughter, but concerning the application of the money arising from it, she had no election, but only a request of supervision; for if she directs the application, the *quo modo* is prescribed. Suppose Lady *Bute* had appointed the trustees to convey to *I. S.* for money, and had given no directions touching the application, and the trustees had conveyed and received the money, could there be a doubt or hesitation that on a bill brought by any remainder-man, this court must have decreed a purchase and settlement in the same manner as if she had made no appointment for the trustees to convey? It must have been decreed with regard to the rents and profits of the premises in the hands of the trustees.

It appears to me, likewise, from the clause of the power, and the provisions in default of execution of it, that Mr. *Wortley* intended these premises to be sold as soon as it was possible that they could be fairly, and for a valuable consideration, to answer his wish of freeing his family from the expenses of the management of

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this court ; because Lady *Bute*, who has the power, is made to be interested in the execution of it ; for if the premises are sold and reinvested, she becomes tenant for life of the new purchased lands. But if the power be not executed, she becomes only tenant for life of the lands from time to time purchased out of the rents and profits.

He incited, therefore, his daughter to sell, by making it her interest so to do. He confided in her prudence and honour not to do it under unreasonable disadvantages, as the whole would ultimately centre in her children. If this be a true light for considering this case, it puts aside and removes any similitude of this case to all those questions that have arisen upon the effect of devises, coupled with a rogation. For Lady *Bute*, on this mode of reasoning, is only vested with a power of election ; if she takes in consequence of a disposal, she takes an express estate for life ; if she does not direct a disposal, she takes an express estate for life in the clear profits when invested in new purchases. Whereas, in the case of rogation, the interest *prima facie* vests absolutely in the person requested, and the doubt is only on the intent of the testator, whether that legacy is restricted and contracted by a donation over, or, which is in substance the same thing, by a mandate irresistible of the testator.

I must take notice, that it was contended for the infant by all his counsel, that the testator intended only to appoint his daughter absolute auditor, inspector, and supreme judge of his trustees, and to prevent the expense of this court by wresting out of the hands of this court its jurisdiction, and putting it into the hands of his daughter. But I see no reason to think that any thing so wild ever entered into his head, for if it was not conveyed from the trustees into another family he intended it should continue in trust, and while it continued in trust he knew

it must remain subject to the jurisdiction of this court ; and I dare say would not have invested this in trust, if he had not confided in this court for the execution of those trusts.

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STUART.

I have now given my thoughts, together with my reasons for the construction I put on Mr. *E. Wortley's* will, and the intent I collect from it. It remains only for me to declare, that after the maturest deliberation, I am of opinion that Mr. *Wortley* did not intend to empower the Countess of *Bute*, his daughter, to direct the trustees to dispose of the premises for her absolute benefit, or without consideration, but that he intended only to give her a power to sell the same, and that the money arising therefrom should be applied in the purchase of lands in the same manner as the clear profits of the premises, in case she had made no appointment. And that therefore the appointment made to the Earl, her husband, is void, and his bill must be dismissed.

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This decree was afterwards affirmed in the *House of Lords*, 28th January, 1762. 1 Bro. P. C. ed. Toml. 476. Lady *Bute* being thus considered as only having a power of sale, it was proposed that Lord *Bute* should be the purchaser: but the trustees, acting for the infants, would not execute the conveyance according to the appointment of Lady *Bute* without the directions of the court. Lord *Bute* accordingly filed a bill to have a sale made under the direction of the court. The cause came on to be heard before the Lord Chancellor on the 5th of December, 1763, when a decree was made for a sale of the collieries, and all the articles, stock in trade, implements, &c. were decreed to be sold ; and under that decree cash in *Child's* bank, and in the hands of the agent and the fitters, was transferred as stock in trade. *Reg. Lib. A.* 1763, fol. 49. A question afterwards arose upon the same property under the will of

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Lord Bute: in which, words, nearly resembling those used by Mr. Wortley, were, on the authority of the above decree held by Lord Rosslyn to comprehend money due from the fitters and others, and cash in the Tyne Bank. *Stuart v. Earl of Bute*, 3 Ves.

212. This decision was afterwards affirmed by Lord Eldon upon a rehearing, 11 Ves. 657, but not without so much doubt as to induce the parties to appeal to the House of Lords, where it was reversed. 1 Dow. P. C. 73.

*q. l. 19. 424.*

### FOX v COLLINS.

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 1761.  
 S. C.  
 Amb. MSS.

(Reg. Lib. Min. Mic. 1761).

Residuary bequest to "the said A. C." there being two persons of that name (A. C. of St. I. and A. C. of H.), both of whom were specific legatees; held, from the manifest intent of the testator, apparent on the face of the will, that the former was entitled.

PHINEAS EVANS, by his will of 7th September, 1759, devised his real estate in *North Benfleet* and *Wickford*, to his cousin, *Sidney Collins*, widow of *Nehemiah Collins*, late of *Leominster*, in the county of *Hereford*, who was the second daughter of his late uncle *Thomas Collins*,\* in the county of *Huntingdon*, and her heirs and assigns for ever; and also bequeathed to her the sum of £500.

He then gave to his cousin, *Edward Collins*, of *Virginia*, in *America*, son of said testator's uncle, *Thomas Collins*, £600, if the said *Edward Collins* should be living at his decease; but in case he should be then dead, then the said testator gave said £600 unto such of his children as should be living at said testator's decease, to be equally divided amongst them, share and share alike: but in case said *Edward Collins* should have no child or children living at said testator's decease, then

said £600 was to be considered as part of the residue of the testator's estate, and to be applied as such. He then gave to the defendant *Ann Collins*, of *St. Ives*, in \*the county of *Huntingdon*, daughter of the said testator's uncle, *Thomas Collins*, £600, and to the defendant, *Samuel Bethell*, grandson of the said testator's late uncle, *Thomas Collins*, £400.

He then gave to *Thomas Collins*, son of said testator's late cousin, *Robert Collins* (who was the youngest son of said testator's late uncle, *Robert Collins*), £500; and to the defendant *Ann Collins*, of *Bromyard*, in the county of *Hereford*, youngest daughter of said testator's late uncle, *Robert Collins*, £300.

After giving several pecuniary legacies to other persons, and (*inter alia*) to the plaintiffs, £100 each, the testator bequeathed all the rest, residue, and remainder of his goods, chattels, and personal estate, of what nature or kind soever, after payment of his just debts, funeral charges, and the charges of proving his will, unto the said *Sidney Collins*, *Ann Collins*, and *Sarah Bethell*, the younger, to be divided amongst them, share and share alike; and appointed plaintiffs executors and executrix of his will. This was a bill by the plaintiffs for the direction of the court in the application of the residue, which was said to be £1400.

Each of the *Ann Collinses* insisted that she was the person meant in the residuary clause, and claimed one third of the residue.

The next of kin insisted that the devise was void for uncertainty, and that they were entitled to the third part of the residue.

There was no parol evidence read of declarations or other marks of predilection of the testator for either of the *Collinses*, but his intention was to be collected from what appeared on the face of the will.

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*The Lord CHANCELLOR.*

The court will prevent an intestacy if possible. I am \* convinced from the will itself, that *Ann Collins*, of *St. Ives*, was intended. The first objects, in point of predilection, were the children and grandchildren of *Thomas Collins*; they stand first in the will, and have the largest legacies. The devise to *Edward*, if living, and if not, then to his children; and if there are no children, the directions that the legacy should be considered as part of the residue of his estate, and applied as such, are very material to shew his intention that the residue should centre amongst the descendants of *Thomas*. The word "said" in the residuary clause does not refer to *Ann Collins*, of *Bromyard*, as the last antecedent, but is applicable to all the three residuary legatees, as coupled together, and is very strong in favour of *Ann Collins*, of *St. Ives*, who stands as a legatee in the body of the will, placed between the other two, as she is in the residuary clause, and they are all three descendants of *Thomas Collins*.

Every reason that can be assigned for inserting in the residuary clause the name of *Ann Collins*, of *Bromyard*, holds stronger for inserting therein the son of *Robert*, which the testator has not done.

Decree one third of the residue to *Ann Collins* of *St. Ives*.

VERNON v. BETHELL.

(Reg. Lib. B. 1761. fol. 127.)

25th, 26th, 27th,  
& 29th Jan.  
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**MAJOR VERNON** was seised in fee of an estate in *Antigua*, of the value of about £1000 *per annum*, from whence he had his sugars consigned to Mr. *Bethell*, a *West India* merchant in *London*, as his factor. Being indebted to the amount of £278 by mortgage upon the estate, he procured an assignment of the mortgage, bearing date 5th *March*, 1729, to *Bethell*, and borrowed several further sums, amounting to about £5000 or £6000; the mortgage being made a security for any further sums which *Bethell* might advance to him.

In a letter to *Vernon*, bearing date the 23d of *April*, 1738, *Bethell* expressed himself as follows; "My account is swelled to so enormous an amount, that I must have possession of the *Antigua* estate, in order to save something for your family:" and at the same time inclosed the balance, which then amounted to £9541 : 9s. : 1d.

By indenture, bearing date the 25th of *August*, 1738, reciting the mortgage, and several advances, and that the sum of £9976 : 1s. : 11d. was then due to *Bethell*, which was the full value of the inheritance, and that *Vernon*, for the consideration of five guineas, had agreed to convey the inheritance to *Bethell*, he releases and conveys the premises to hold to *Bethell*, his heirs and assigns. From that time *Bethell* continued in possession of the estate and receipt of the profits.

The plaintiff having filed a bill for an account and redemption; *Bethell* died soon after, and in his will, dated the 19th of *March*, 1758, was the following clause. "And whereas I have not devised my real estate in *Antigua*, which I purchased of Mr. *Vernon*, who sets up unjust

*A.* having granted a mortgage of anticipation to *B.* of a *West India* estate, being found upon an account taken to be greatly indebted to him, releases the equity of redemption to *B.* and his heirs; it not appearing, however, at the time to have been intended as an absolute sale, and *B.* having, both by letter and in conversation, stated himself as being only mortgagee in possession, a redemption was decreed.

Legacy from *B.* to *A.* on condition that he notified to his executors his willingness to release his claims: held, that he had forfeited his right to it by filing the present bill.

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pretences to defeat it, in order to leave my residuary legatee as little embarrassed as may be, I order my executors to pay *John Vernon* £6000, on his notifying his willingness to release the claims he makes, and on that condition only I give it him." Upon this the plaintiffs filed a supplemental bill for an account, in order to enable him to elect whether he should take the £6000, or have a redemption.

Several letters and declarations of the deceased, as acknowledging the mortgage, were put in evidence by the plaintiffs. An answer to a letter of Colonel *King*, who had applied to purchase the estate. "June 5, 1739. I cannot yet dispose of the estate, having given the Major my word that it should go back to the family when my balance is paid. I cannot be worse than my promise, but should it ever be to be disposed of whilst in my possession, you shall have the refusal." In a second letter to Colonel *King*, dated the 17th of *September*, 1739, he says, "As to *Vernon's* estate, you will find, in a former letter, I advised that the affair is so circumstanced as to admit of no alteration." And to the plaintiff, "9th *May*, 1758. I shall do you that justice which I ever intended in the first instance of my purchase of the estate."

The following parol declarations of *Bethell* were also proved: to Dr. *Rose* he said, "that he was bound in honour and conscience, as well as by promise, that the Major should have the estate again on his being paid, though he had got an absolute acquittance;" and at another time, "Let him pay me what he owes me, and he shall have his estate again;" to *Samuel Martin* he said, "that when he obtained the conveyance, he voluntarily promised the plaintiff, or his family, that they should have the estate again on paying the money; and that he thought himself bound in honour and conscience, though

not in law: and that he had doubted in sending in the account, whether he should not admit the redemption." To Sir *Crispe Gascoign* he said, "that he had promised to return the estate again when he was paid."

On the part of the defendants it was proved by *North*, a solicitor, who prepared the conveyance, that *Bethell* proposed the consideration to be five shillings, but that he objected, and *Bethell* then agreed it should be five guineas.

The *Attorney-General*, the *Solicitor-General*, Mr. *Wilbraham*, and Mr. *Gascoigne* for the plaintiff.

Mr. *Sewell* and Mr. *de Grey* for the defendants.

There are two questions which arise upon the present case. 1st. Whether the plaintiff has a right to redeem; and 2dly. Whether he has any right to the £6000. The great rise of the value of estates in *Antigua* is the cause of the present suit. The conveyance is quite regular as a purchase, and contains all proper covenants. If it is not an absolute purchase, what is it, or what can be the use of it; because *Bethell* was before the execution of it in the possession of the estate? The deed neither contains a defeasance, nor is there any promise of a defeasance proved. As to the other point; by the prosecution of this suit he must be considered as having waived all right to it. The case of *Cleaver v. Spurling*, 2 P. W. 526, is in point: there a freeman having given by his will £35 to his daughter, provided that, if she refuse to give a release, or put his executors to any trouble, then her legacy of £35 to go over, the daughter claiming her orphanage part was a forfeiture, and the legacy being vested in the devisee over, equity would not divest it.

*The Lord Chancellor.*

The principal question in this cause is, whether, upon

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the whole of this transaction, the plaintiff ought to be decreed a redemption of this *Antigua* estate, or that I should consider Mr. *Bethell* as the absolute purchaser thereof *bonâ fide*, and for his absolute benefit under deed of the 25th of *August*, 1738.

This court, as a court of conscience, is very jealous of persons taking securities for a loan, and converting such securities into purchases. And therefore I take it to be an established rule, that a mortgagee can never provide at the time of making the loan for any event or condition on which the equity of redemption shall be discharged, and the conveyance absolute. And there is great reason and justice in this rule, for necessitous men are not, truly speaking, free men, but, to answer a present exigency, will submit to any terms that the crafty may impose upon them.

The present case, as it stands on the deed, is not that ; but when it is considered with the other proofs, and particularly with the letters and books of Mr. *Bethell*, it seems to be very much within the mischief which the rule intended to prevent, of making an undue use of the influence of a mortgagee.

The case is this: Mr. *Bethell* was a *West India* merchant, and consignee of the produce of Mr. *John Vernon*'s estate, and advancing him from time to time several sums of money, secured by a mortgage of anticipation at an interest of five *per cent.*, with springing redemptions on the several loans. By the year 1738 there appears to be due to the mortgagee near £10,000, upon which Mr. *Bethell* applies to Mr. *Vernon* by letter, No. 1, and that is the only intercourse, by writing or otherwise, proved to me, concerning the deed of the 25th of *August*, 1738. For the orders and instructions for the deed were given by Mr. *Bethell* to Mr. *North*, who only believes he sent the draft of the release to Mr. *Vernon*. This letter mentions

the largeness of his demands, that it was no longer to be trifled with, and that therefore he must insist on having the possession, not for his own security only, but for preserving something out of the estate which might remain to Mr. *Vernon* and his family.

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I cannot, therefore, believe, that at the time of writing this letter, Mr. *Bethell* intended to take in propriety and as an absolute purchase for his own benefit. Besides the consideration of the conveyance is only five guineas (which Mr. *Bethell* intended five shillings), and the alteration of it was Mr. *North's*. And though Mr. *Vernon* granted and released the estate, yet Mr. *Bethell* never released the covenant for the payment of the mortgage-money, or made it part of the consideration. The same account is kept afterwards with this difference only, the one is kept as consignee, the other as consignee and mortgagee in possession.

It was asked, if this deed was not to be an absolute purchase, what was to be the use of it? Answer, a very material one, and which answered the exigency of the letter; the easy and certain method of getting possession. Every body knows the difficulty of getting possession under a mortgage in the *West Indies*. But there is no difficulty in getting possession on a purchase. It was said, there was no promise of a defeasance. That is not necessary. But here is proved, in writing, a promise that the estate should be only a pledge, and that the deed should be defeasible (a).

As to the £6000, it is given on terms conditional, and must be taken by a compliance with them. Mr. *Bethell* negatived the plaintiff's right, and offered this as a *bonus* for him to negative the same. He has pursued that right,

(a) *Vide Spurgeon v. Collier*, and note to it, *ante* Vol. I. p. 60.

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and insisted on it; therefore, if he had failed, I should have been of opinion, he could not have resorted to the £6000 (a).

(a) As to legacies upon condition not to dispute a will, vide *Lloyd v. Spillet*, 3 P. W. 344. *Powell v. Morgan*, 2 Vern. 90., and the cases in the notes.

## PRICE v. GIBSON.

3d & 5th Feb.  
1762.

(Reg. Lib. B. 1761. fol. 140.)

Devise of all my estate at C. H. to A. for life; remainder to B. & C. is a devise in fee to B. & C.

A. devises certain premises (subject to a mortgage of 3500*l.*) to his three daughters, to be divided equally; one dies; mortgagee bequeaths to the two survivors all the money due on the mortgage and the interest, so that it do not altogether exceed 4000*l.*, and if it do not amount to 4000*l.*, then to be made up: the other daughter dies, leaving all her real and personal estate to the third: held, that the charge is merged in the inheritance.

*FLUELLIN ASPLEY*, by his will, dated the 8th of April, 1741, devised all his freehold and leasehold estates (subject to a mortgage for £3500 to his brother-in-law *Samuel Brackley*) to his three daughters, *Ann*, *Jane*, the wife of the defendant *Gibson*, and *Frances*, to be divided equally between them, share and share alike. *Mrs. Gibson* died on the 23d of June, 1742.

*Samuel Brackley*, by his will, dated the 20th of July, 1744, taking notice of the said sum of £3500 due to him on mortgage, and that there was a considerable arrear of interest owing, devised as follows: "Now I do give and bequeath all my right, title, and interest, of, in, and to, my brother *Fluellin's* estate, now in mortgage to me, and all sum and sums of money due to me therefrom or thereout, unto *James Brackley* and *Christopher Gibson*, in trust; nevertheless, to permit and suffer my nieces, *Ann* and *Frances Aspley*, to receive the interest and profits thereof during their natural lives, share and share alike. But in case either of them shall die without issue, then the share or part of her, so dying, to go to the sur-

vivor of them. And my mind and will is, that in case my nieces, or either of them, shall leave any child or children, then, and in that case, the share of her or them, so leaving children, shall go and be payable to such issue when they attain twenty-one; and in the mean time the interest and profits shall be applied for and towards their maintenance and education. It being my intention that my nieces and their children (if any) shall have only £4000, and the interest as aforesaid; and therefore, in case the interest due upon the said mortgage shall exceed the sum of £500, it shall go to my personal estate; and in case the interest due upon the said mortgage shall not amount to the sum of £500, it shall be made up out of my personal estate."

*Ann* died unmarried, having devised all her real and personal estate to *Frances*, who, by her will, dated the 17th of *September*, 1757, devised the said premises by the following terms: "all my estate called *Coal-harbour*, *Whetstone*, *Ham*, &c., to *Tryon Perkins* for life; remainder to *Rebecca Price* and *Ann Owen*;" she then gave all the rest and residue of her estate to the defendant *Gibson*, whom she made her sole executor.

*Tryon Perkins* being dead in the lifetime of the testatrix, this bill was brought by the plaintiffs to be quieted in their enjoyment of the real estate, and to have deeds and papers delivered up. The defendant *Gibson*, by his answer insisted, 1st, the £3500 was a charge on the estate, and part of the personal estate of *Frances Aspley*; and 2dly, that the plaintiffs were only tenants for life.

The *Attorney-General* (a), Mr. *Wilbraham*, and Mr. *Bicknell*, for the plaintiffs.

Mr. *Sewell* for the defendant *Gibson*, and Mr. *Perrot* and Mr. *de Grey* for the heirs at law of *Frances Aspley*.

(a) Hon. C. Yorke.

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This being a trust by way of security, it does not merge in the inheritance, *Chester v. Willes* (a). In *Gwilim v. Holland* (b), 20th July, 1741, a daughter had a charge of £2000 on an estate, which descended to her in fee by her brother's death; and there it was held, that it did not merge. For as it was said by Lord *Hardwicke*, in *Hopkins v. Hopkins*, it is a rule in equity that mergers are not suffered in equity, where the legal estate is in trustees. Another rule in equity is, that a merger never takes place, except where the estates are co-extensive. Now, in the present case, with respect to the mortgage-money, the daughters took nothing but an interest for life; the principal was given to the children in cross remainders. Therefore, if the estate had been left after payment of debts, the whole would have been vested in *Frances*. And this sum of £4000 was vested in her, so as to be divisible.

As to the question, what the plaintiffs took under the will of Mrs. *Aspley*, there is nothing to show that it was not a life estate. There has been no case where the words "all my estate to *A.* for life, and after to *B.*" have been considered a devise over in fee. No reliance can be had on the word estate; it is a mere local description.

*The Lord CHANCELLOR.*

This bill is in effect brought to determine two questions: 1st. What interest the plaintiffs took in the real estate by *Frances Aspley's* will; and upon that point I am of opinion, that the plaintiffs took an estate in fee (c).

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|-------------------------------|-------------------------------------|
| (a) <i>Amb.</i> 246.          | them, in point of locality, or      |
| (b) <i>Cit. ib.</i>           | with previous express limita-       |
| (c) It has been repeatedly    | tions for life, carry a fee.        |
| settled, that the words "all  | <i>Holdfast v. Marten</i> , 1 T. R. |
| my estate," even though       | 411. <i>Doe v. Burnsall</i> , 6     |
| coupled with others, limiting | T. R. 34. <i>Doe v. Wright</i> , 8  |

The second question is, whether the mortgages are \*now to be deemed discharged, or to remain as securities, and part of her personal estate, and go to the defendant, her executor: and upon that I am also clear that the estate is devised discharged of the securities (a).

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T. R. 64. *Doe v. Child*, 1 charge on his own estate, and  
N. R. 335. *Roe v. Wright*, where that is the case it will  
7 *East*, 259, *vide post. Cave* be held to sink, unless some-  
*v. Cave*, 145. n. thing shall have been done by

(a) The doctrine as to the charge on his own estate, and  
merger of charges was much where that is the case it will  
discussed in *Forbes v. Moffatt*, *Wyndham v. the Earl of Egremont*, Amb. 753. Lord *Compton v. Oxendon*, 2 *Ves.* jun.  
18 *Ves.* 384. "In most in- 261. As to the exceptions to  
stances," as there observed by the rule, *vide Donisthorpe v. Porter*, *post.* 162.  
Sir *W. Grant*, "it is, with reference to the party himself,  
of no sort of use to have a

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KNIFE v. THORNTON.

(*Reg. Lib. A. 1761. fol. 503.*)

23d & 24th  
February,  
1762.

ROBERT THORNTON, who was a freeman of the city of *Covenants in the marriage settle- ment of a free- man of the city of London, that the husband might dispose of the wife's share by will, and also that her execu- tors would re- lease and convey all her interest,*  
*London*, had three children by his first wife, viz. the plaintiffs, *Jane*, the wife of *Nathaniel Knife*, *Hannah*, the wife of *William Wilberforce*, and the defendant, *John Thornton*.

On his marriage with his second wife *Jane Newby*, by indentures, bearing date the 26th and 27th of *October*, 1733, reciting, that in consideration of a marriage to be

&c. to the husband: held not to vary the general rule, that the children should be entitled to the benefit of a composition with the widow.

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had, and for making a full and ample provision and jointure for her in cases she should survive him, and in full bar, lieu, and satisfaction, as well of dower as also of all parts, shares and interest, claims and demands which she should, could or ought to have out of the personal estate of the said *Robert Thornton*, at the time of his death, by means of the custom of the city of *London*, or of the statute of distributions or otherwise, except what he might give her by deed or will ; the said *Robert Thornton* conveyed the manor of *Ottringham*, in the county of *Warwick*, to trustees upon trust from and after his decease to the said *Jane Newby* for life, for and as her jointure, and in full lieu, satisfaction, and bar, as well of her dower as of all interest, claim and demand into and out of his personal estate as aforesaid. The deed contained the following covenants from the said *Jane Newby*, First, That she would remain satisfied with the said jointure: Secondly, That she would not set up any claim or demand out of the personal estate of the said *Robert Thornton*: Thirdly, That the said *Robert Thornton* might dispose of by will, and bequeath any part or share of his personal estate which she might otherwise have been entitled to, in the same manner as he might have bequeathed any other part of his personal estate: Fourthly, She covenanted for herself and her executors, that she would release and convey all interest, claim or demand which she might have to the personal estate of the said *Robert Thornton*: and Fifthly, That in case she should survive the said *Robert Thornton*, she would not take out letters of administration to his personal estate.

*Robert Thornton* had two daughters, *Elizabeth* and *Jane*, by his second wife ; and by his will bearing date the 29th of *December*, 1747, reciting, that he had advanced £4000 each to his daughters by his first wife on their marriages ; he gave them £1000 each in addition.

and also gave £5000 each to his daughters by his second wife.

This bill was brought by the daughters against *John Thornton*, the son, who was executor and residuary legatee, for an account of the personal estate of the testator, and payment of their orphanage share.

The *Attorney-General* and Mr. *Wilbraham* for the plaintiffs.

The custom of the city of *London* is part of the general old law, and is of such force that it will in general get the better of covenants made in restriction of it, and control them; nevertheless all voluntary acts, if done by the freeman *bonâ fide*, are good; but if they are done with an intention not to strip himself, but to disappoint the custom, it is a fraud upon the custom, and inoperative against it. *Tomkins v. Ladbroke (a)*. All acts for valuable consideration in restriction of the custom are good: for instance, a covenant on the marriage of a daughter to release the customary part, is good, and falls into the general estate; so also must an agreement before marriage that the wife must be barred of her customary share, and where the wife is compounded with, it shall be taken as if there was no wife, and her share shall fall into the estate. The attempt of the husband, in this case to purchase the wife's share, must be considered as a fraud on the custom, and void as against the children. *Hancock v. Hancock (b)*. *Rawlinson v. Rawlinson*, cit. 8 P. W. 644. *Blunden v. Barker*, 1 P. W. 634.

Mr. *Perrot* and Mr. *Sewell* for the defendant.

Mr. *Thornton* by the settlement became a purchaser of the wife's share; and even supposing that, according to the general doctrine, a husband cannot control the

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(a) 2 Ves. 591.

(b) Cit. 2 Ves. 592.

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operation of the custom, yet the peculiar covenants of this settlement must be considered as effectuating that intent. The covenant enabling him to dispose of his wife's share by will, proves that he must be considered as taking it; and if anything be wanting to confirm that, the subsequent covenant on the part of her executors to release, places that construction beyond a doubt.

*The Lord Chancellor.*

The single question which arises in this case is upon the operation of the deed of 1733; and it is whether *Robert Thornton* is a purchaser in trust for himself of the wife's customary share, or for his children as well as himself; for it is agreed by the counsel on both sides, that if the settlement creates a composition or bar of the wife's customary share, it shall fall into the general *residuum* of the personal estate: and how that could admit of much doubt I cannot see. The personal estate of a freeman is just the same as the personal estate of any other individual, and the custom is nothing more than a claim or debt upon it. If one claim be extinguished, the personal estate remains in its original nature, and subject only to lesser claims. The term composition with the wife, would, I think, be more correctly expressed by the words extinguishment or bar. However, the law of the city has fluctuated upon this point till of late years (*a*).

(*a*) In *Green v. Green*, cit. n. 1 *P. W.* 644. it was stated that the precedents had been both ways, but that the most solemn ones were against the children. In *Pusey v. Desbouverie*, 3 *P. W.* 315. however, it was determined by Lord Talbot, that where the wife was compounded with, it should be taken as if there was no wife, and the like was held by Lord Hardwicke, *Metcalf v. Ives*, 1 *Atk.* 63. *Morris v. Burroughs*, ib. 403. & 2 *Atk.* 627. *Read v. Snell*, 2 *Atk.* 644. *et vid. Pickering v. Lord Stamford*, 3 *Ves.* 337.

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Let us first consider what was the intent of this agreement: and upon that point I am clearly of opinion that the husband's only view was to extinguish the wife's right, and to free his personal estate of the custom and the statute of distribution; and as far as the statute extends, the settlement would operate as nothing more than an extinguishment. The recital too is very expressive of the intent, "for making a full and ample provision and jointure, and in full bar, lieu, and satisfaction, &c."

Much reliance, however, has been placed by the counsel for the defendant upon the covenants; they are said to be executory in order to effectuate *that* in equity, which might be void at law as a release. Still I think they do not carry the case beyond the mere extinguishment of the wife's claim. It has been objected that the clause enabling him to dispose of the wife's share by will, has made him a purchaser of her share; but that can only operate as against the wife, and those claiming under her. The covenant to assign and convey to his executors has also been relied upon; but I think that it can only apply to bring it more effectually into the general mass of the whole personal estate. Upon the whole I see no difference between this particular case and the general rule upon the subject of composition.

I am therefore of opinion that the deed of the 17th of October, 1733, was intended to operate, and did operate only as a bar of the widow's claim of her share under the

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The doctrine is the same in of the estate of which he the case of advancement, of would have power to dispose; which, as observed by Sir but it was held otherwise, *W. Grant* in *Folkes v. Western*, 9 Ves. 460. "one should that it had no effect except think, *primâ facie*, the effect to remove that child entirely would be to increase the part out of the way, and to increase the shares of the others."

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custom of the city of *London*, and the statute of distribution; and that in consequence thereof the testator's personal estate ought to be divided into five equal parts, and each to be given to the five children; but that the plaintiffs, claiming the custom of the city of *London*, ought to bring what they have respectively received by way of advancement into the orphanage part; and that what they have received as legatees ought to be accounted for to the personal estate, they not being entitled to take both by the will and the custom.

L.N. 10 C.R. 707.  
1893. 3 Ch. 373.

CRESWELL v. CHESLYN.

8th March, 1903. 1 Ch. 282.

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(Reg. Lib. A. 1761. fol. 180.)

Testator gives the residue of his personal estate to his three children *A.*, *B.*, and *C.* share and share alike, as tenants in common, and not as joint tenants; but by a codicil revokes *C.* from being one of his residuary legatees, and gives a pecuniary legacy instead: held, that this third does not belong to the two other residuary legatees, but shall go according to the statute of distributions.

*RICHARD CHESLYN* by his will, bearing date the 31st of *July*, 1758, bequeathed to his brother *Thomas Cheslyn*, and his two sons, *Richard* and *Edward Cheslyn*, £1000 Bank stock, in trust, to pay the interest and dividend to his eldest son, *Peter Courtney Cheslyn*, for his life; and after his decease to transfer the same to such persons as would be entitled thereto by the statute of distribution; also £1000 Bank stock in trust, for his daughter, *Mary Cheslyn*, in like manner; and after giving several sums to his daughter, *Sarah Creswell* (the wife of the plaintiff *Henry Creswell*), and her children, he gave and bequeathed to his son *Richard* £1000, part of his Bank stock, and to his son *Edward* £1000, part of his Bank stock. After giving several annuities, and some specific and pecuniary legacies to his brother and his children, he gave, devised, and bequeathed, all the rest and residue of his estates, real and personal, of what nature, kind, or

quality soever, which he should be any ways entitled to at the time of his decease, to his said sons *Richard* and *Edward*, and his said daughter *Mary Cheslyn* equally, share and share alike, as tenants in common, and not as joint tenants. He appointed his brother, *Thomas Cheslyn*, and his two sons, *Richard* and *Edward*, joint executors of his will.

By a codicil, bearing date the 27th of *December*, 1760, reciting, that he had made his will, and appointed his daughter, *Mary Cheslyn*, one of his residuary legatees, he revoked that appointment, and thereby gave her in lieu thereof the interest of £500 New South Sea annuities carrying 3 *per cent.* to be paid to her half yearly by his executors during her life, and at her death the principal sum to be equally divided among her brothers and sisters; and in all other things confirmed his will.

The testator's daughter, *Mary*, died on the 17th of *April*, 1761, intestate, and on the 29th of the same month the testator died, leaving his said three sons and his daughter, *Sarah* his next of kin. This was a bill by *Creswell* and his wife, claiming to be entitled equally with the three sons to a distributive share of the £1000 Bank stock, and £500 New South Sea annuities; and that the testator having revoked the bequest of one third of the *residuum* of his estate, he ought to be considered as having died intestate with respect thereto, and praying that the same might be distributed between the next of kin.

The *Attorney-General* and Mr. *Jones* for the plaintiffs.

The devise of the residue of the personal estate was to the three children of the testator expressly as tenants in common: had one of them died in the lifetime of the testator, the share of that child would have been lapsed; so it is also if the share of one of them is revoked by the testator. In the present case the share of *Mary Cheslyn*

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has been revoked, and the codicil makes no new disposition of it.

Mr. *Sewell* and Mr. *Wilbraham* for the defendants.

The testator having appointed three residuary legatees, and afterwards revoked one of them, it is the same as if that one had never been named. It is an established rule that a codicil confirming a will is a republication, and the will and codicil make but one instrument; it therefore becomes the same as if the will was written over again and re-executed with the alterations in the codicil. *Acherley v. Vernon*, Com. Rep. 381. *Potter v. Potter* (a). Here the codicil having confirmed the will, it is the same as if the testator had said that his two sons should be residuary legatees of his whole personal estate. By the will the testator meant to dispose of his whole estate, and the codicil shews no alteration of that intention; on the contrary, though it makes an alteration in the objects, yet it confirms the intention to dispose of the whole, and not to die intestate as to any part of his estate. The interest of the £500 3 *per cent.* annuities was given by the testator to his daughter in lieu of her share of the residue, and yet by the construction contended for, if she had survived the testator, she would have had both the interest of the £500 and a part of that very third of the residue in lieu of which it was given, and which the codicil had taken from her.

*The Lord CHANCELLOR.*

The testator has made no new devise by the codicil of his share which he has revoked from his daughter *Mary*, and therefore the sons can have no greater interest than they had by the original will; I must, therefore, declare, that the clear residue of the testator's personal estate, not

(a) 1 *Ves.* 437.

specifically bequeathed, must be divided into three equal parts.

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This decree was affirmed in the *House of Lords*, 9th February, 1763. 3 Bro. P. C. Ed. Toml. 246.

Serjeant Hill to his MS. report of this case has added the following note. "Qu. if this determination be right: for it is clearly settled that a codicil confirming a will is a republication of it, *Com.* 381. MS. in 8 Vin. 163-4-5-6. and the effect of a republication is this, that it is the same as if the will was written over again and re-executed with

the alterations in the codicil, and whatever the words of the will as it then stands are sufficient to pass, will pass by it; for the will, as altered and new modelled by the codicil, makes but one will, and are considered as written at the time of the codicil." The learned Serjeant makes a similar qu. in his copy of *Viner*, which is in *Lincoln's Inn* library. The Editor has not been able to discover any subsequent case which at all resembles it.

SHANLEY v. HARVEY.

(*Reg. Lib. Min. App.* 1761.)

15th March,  
1762.  
S. C.  
Cit. Harg. argu-  
ment in the  
Negro Case.

THIS was a bill brought by *Edward Shanley*, esquire, as administrator of *Margaret Hamilton*, deceased (a), against *Joseph Harvey*, a negro, and two persons of the

given by her as a *donatio causá mortis* to a negro who had been brought to England as a slave, dismissed with costs.

(a) This fact is not stated in Mr. *Hargrave's* note of the case, in which the plaintiff's claim is represented as being solely founded on the circumstance of his being *Harvey's* master.

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name of *Gossop* and *Thorpe*, his trustees, and *Francis Shanley*, one of the next of kin, for an account of part of her personal estate under the following circumstances.

The plaintiff had twelve years before brought over the defendant, *Harvey*, as his slave, then only eight or nine years old, and presented him to his niece, *Margaret Hamilton*, who had him baptized, and changed his name.

On the 9th of *July*, 1752, being then very ill, she, about an hour before her death, directed *Harvey* to take out a purse, which was in her dressing-case drawer, and delivered it to him, saying, "Here, take this, there is £700 or £800 in bank notes, and some more in money, but I cannot directly tell what, but it is all for you, to make you happy : make haste, put it in your pocket, tell nobody, and pay the butcher's bill." He then knelt down and thanked her. She said, "God bless you, make a good use of it."

The *Attorney-General* and Mr. *Hoskins* for the plaintiff. Mr. *Sewell* and Mr. *Perrott* for the defendant *Harvey*.

*The Lord CHANCELLOR.*

As soon as a man sets foot on English ground he is free : a negro may maintain an action against his master for ill usage, and may have a *Habeas Corpus* if restrained of his liberty (a). (*Harg.*)

Bill dismissed with costs.

(a) *Vide Somersell's Case*, 20 *How. St. Tr.* 1.

*J. K. 749. 155.*

RAYNER v. STONE.

(*Reg. Lib. Min. Pasch. 1762.*)

19th March,  
1762.  
S. C.  
Core, MSS.

THE bill in this case was for a specific performance of several contracts and agreements entered into by the defendant as contained in a lease, dated in the year 1746, and since determined; and also for an account, &c.

The defendant demurred to so much of the bill as sought to compel him to repair and amend the hedges and fences belonging to the premises, or to put the mansion-house and other buildings in repair, or to account for the loppings, toppings, and hedges, which the defendant had cut on the premises, or to account for the fodder and dung which he had removed, or to set up land-marks, stones, and fences, and assigned as cause of demurrer, 1st. That the plaintiff hath not shewn sufficient matter to entitle himself to any relief in this court, and 2dly. That the remedy, if any, was at law.

The *Attorney-General*, and Mr. *Wilbraham*, for the defendant, argued, that the demurrer was well founded, the whole subject of the bill being matter of damages; and the lease being determined, made the argument the stronger in support of the demurrer; for then nothing could be considered but the mere breach of covenant, a matter plainly determinable at law, and which ought not to be drawn to the jurisdiction of this court: that besides the lease being determined, there could be no specific repair, for the defendant could neither enter to repair, nor take botes for that purpose. That the whole was therefore plainly turned into damages, and a pecuniary demand;

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 v.  
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that the court could not judge of the repairs, having no officer to see whether they were made or not.

Mr. *Sewell* and Mr. *Coxe* for the plaintiff.

This is a case of great consequence to all landlords; a covenant to leave in repair being a covenant, which it is peculiarly important to have specifically performed, and a plaintiff is not, after a mansion-house has been destroyed, to be turned to law for a recovery of damages only. It seems impossible to say that the plaintiff can be entitled to no relief, for what is more common than bills for a specific performance of covenants to convey lands, of covenants for further assurance of contracts to build a house, &c.?

In the case of the Duke of *Buckingham v. Ward* (a), the thing to be done was the leaving a certain quantity of alum, and some other particular things, upon the premises at the end of the term; and in that case a specific performance was decreed, even before the term expired; for, if *Ward* did not comply with his covenants, the works must stand still at the end of the lease. Here the defendant has agreed to repair, and he ought to perform his contract, and it is the business of a court of equity to enforce it. Shall it be permitted in equity to say, as an excuse, that you may recover damages at law, when damages are not adequate to the thing? In the Duke of *Somerset v. Cookson*, 3 P. W. 390, the duke brought his bill as lord of the manor of *Corbridge*, in *Northumberland*, that the defendant might be decreed to deliver to him a plate of silver remarkable for a Greek inscription (dedicated to *Hercules*), and that, in the mean time, the defendant might be restrained from effacing the inscription: the plaintiff entitled himself to it as a treasure-trove within the manor. Demurrer, for that the plaintiff

(a) 3 Bro. P. C. Ed. Toml. 581.

had his remedy at law by trover or detinue: but overruled; for at law he can have only damages, and the plaintiff is entitled to the thing in specie; and the defendant is not entitled to narrow the matter of relief.


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*The Lord CHANCELLOR.*

This bill is founded upon an equity so extremely refined that I cannot well comprehend it. If I should encourage such bills, it would introduce a practice most prejudicial to all landlords and tenants: especially to tenants, who, for the most part, are of mean and low circumstances. I am sure I shall never consider what are called common covenants in a lease as specific covenants, to be subject to the jurisdiction of this court. The covenants here are not at all of that specific nature. The argument which has been mentioned, that I have no officer to see the performance, is, to me, very strong. How can a Master judge of repairs in husbandry? What is a proper ditch or fence in one place may not be so in another. It is said, that this is an equitable right; and it is insisted that I should now put the plaintiff in a better state than what he can be at law: but the court has no jurisdiction to strip the defendant to try the supposed breach of covenant at law. Besides, how can a specific performance of things of this kind be decreed? The nature of the thing shews the absurdity of drawing these questions from their proper trial and jurisdiction. Therefore let the demurrer be allowed.

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In the same manner a specific performance was refused of a covenant to make good a gravel-pit. *Flint v. Brandon*, 8 Ves. 159. And on a like principle of the impossibility of ascertaining the damage done, or making compensation to the covenantee, the courts have refused relief against the lessor's right of re-entry, for a forfeiture by

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breach of such covenants, as to lay out money in repairs ; to insure ; not to assign without license, &c. *Wadman v. Calcraft*, 10 *Ves.* 67. *Hill v. Barclay*, 16 *Ves.* 402, and 18 *Ves.* 56. *Bracebridge v. Buckley*, 2 *Price*, 200. *Rolfe v. Harris*, cit. *ib.* 206. *Reynolds v. Pitt*, cit. *ib.* 212, S. C. 19 *Ves.* 134, which latter cases have overruled *Sanders v. Pope*, 12 *Ves.* 282. See further, on relief against forfeiture, *Northcote v. Duke*, post. 319.

Lord *Thurlow* and Lord *Kenyon* were of opinion that a specific performance could not be decreed of a covenant to rebuild, as it was as uncertain as a covenant to re-

pair. *Errington v. Aynsly*, 2 Bro. C. C. 343. *Lucas v. Comerford*, 3 Bro. C. C. 166, and 1 *Ves.* jun. 235. In the cases, however, of *Holt v. Holt*, 2 *Vern.* 322. *Allen v. Harding*, 2 Eq. Ab. 17, and the City of *Landon v. Nash*, 3 *Atk.* 512, 1 *Ves.* 12, Earl of *Pembroke v. Thorpe*, 3 *Sma.* 437, n., such decrees were made : and in *Moseley v. Virgin*, 3 *Ves.* 184, Lord *Rosslyn* was of opinion, that if the transaction and agreement were in their nature sufficiently defined, there might not be much difficulty in decreeing a specific performance. Vide also *Wright v. Bell*, 1 *Daniel*, 101.

24th March,  
 23d April,  
 1762.  
 S. C.  
*Core*, MSS.

### RYBOTT v. BARRELL.

(*Reg. Lib. Min. App.* 1762.)

To a bill to be relieved against an award upon suggestion of misbehaviour, &c. in the arbitrators, a plea by the arbitrators of the submission and award, with an averment of impartiality, &c. overruled.

THE bill in this case was brought to be relieved against an award upon suggestion of misbehaviour in the arbitrators, and for an injunction to stay proceedings at law upon the arbitration-bond. The defendants interested in

the award put in their answer, and the injunction prayed was refused on motion upon the merits ; and now the arbitrators plead in general the submission and award ; and for plea further say, that they made their award of and concerning the premises to the best of their judgment, truly, honestly, and impartially, without favour or prejudice to either of the parties.

The *Attorney-General*, Mr. *Sewell*, and Mr. *Altham*, argued, in support of the plea, that arbitrators are to be favoured, and that to put them to answer long fictitious charges would be not only a great vexation, but would likewise be laying open the whole matter again as much as if there had been no submission or award, and would be, in effect, to draw the matter submitted from the judgment of the arbitrators to the jurisdiction of this court. *Godfrey v. Bercher*, 3 *Vin. Ab.* 139., where the bill was for an account, and to impeach an award touching a partnership in buying and selling diamonds in *France*, in 1719, and the bill was against the arbitrators as well as the party, and the defendant. The party, as to the account, pleaded the award, and that by consent it was made an order of court. The *Lord Chancellor* allowed the plea.

Mr. *Perrot*, Mr. *de Grey*, and Mr. *Cove*, for the plaintiff.

The plea is bad as deciding nothing ; for suppose it allowed, replied to, and proved, it does not determine the question ; for the bill supposes and admits the award, and the prayer of relief is grounded upon a charge that the award was unduly made, as founded on partiality, misbehaviour, and apparent mistakes in the arbitrators ; the plaintiffs, therefore, ought not by such a plea to be shut out from making out their case in evidence, for, if the plea is allowed, the court, at the hearing, upon a replication to the plea, could only consider the fact of the

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plea, which is a matter not controverted. The rules of pleading in this court are very different from the rules of pleading at law; at law you may traverse anything material to the plaintiff's case, but here every plea must go to the whole of the plaintiff's case. Suppose a bill brought to be relieved against a decree charged to be obtained by fraud, it surely could be no defence to plead the decree itself. So of a release, &c., and in *Corneforth v. Geer*, 2 Vern. 705, it was held, that if it appears that arbitrators went upon a plain mistake, either in law or fact, it is an error sufficient to set aside the award; but the plea in the present case is plainly conclusive to nothing, the question not being whether there was a submission and award, but whether the award was duly made.

As to the case of *Godfrey v. Bercher*, it was as Mr. *Attorney* states it, but there was this further on it, which makes it a case in point for the plaintiff, that the arbitrators pleaded the submission and award, and that by consent it was made an order of this court; but the *Lord Chancellor* overruled the plea of the arbitrators, as covering too much, *viz.* several particulars, which might tend to shew partiality, &c., in their proceedings. Besides, in a subsequent case of *Potter v. Day*, which was before *Lord Talbot*, Mich. 1734, where the bill was, as in the present case, to be relieved against an award, and an action at law on the submission-bond, and the defendant pleaded the submission and award: but the plea was overruled because it covered too much, for the plaintiff is, in all events, entitled to relief against the penalty of the bond, though the merits are with the defendant.

*The Lord Chancellor.*

I look upon it as a notorious fixed rule, that the party grieved by an award may come into this court for relief, both against the arbitrators and the party, and I have

called upon the defendant's counsel to shew any case to the contrary, which they have not been able to do. The answer of the arbitrators in a case of this kind is the more material, because, as I take it, the answer of the arbitrators may be read against the other parties, who may know nothing of the misbehaviour of the arbitrators ; and it would be absurd to say, that the arbitrators should be at liberty to plead their own award, in order to cover their own misbehaviour. The equitable spirit and intent of the submission is plainly this, if you do so and so, I submit, but not otherwise : and it is a maxim of law and common sense, *non valet exceptio ejusdem rei cujus petitur dissolutio*. I do not say that arbitrators are to answer precisely as other defendants are, but yet they ought to answer material charges, and not cover themselves by their own act.

Plea overruled.

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Where an award has been made a rule of court, under the 9 and 10 W. 3. c. 15, the jurisdiction to set it aside is confined to the court of which the submission is made a rule. *Nichols v. Chalie*, 14 Ves. 265. *Gwinnett v. Bannister*, ib. 530. — *v. Mills*, 17 Ves. 419. *Stiff v. Andrews*, 2 Mad. Rep. 6.; vide also *Goodman v. Sayers*, 2 J. & W. 249. *Auriol v. Smith*, 1 *Russell*, 121. And it has been laid down that a court of equity has no jurisdiction to relieve against the award, where one of the terms of the agreement to refer was, that the submission should be made a rule of a court of common law, although it has not been so made within the time limited by the statute. *Davis v. Getty*, 1 S. & S. 411.

12th & 13th  
June,  
1762.  
S. C.  
Cit. 2 Bro. C. C.  
414.

## CLARKE v. SWAILE.

*Et è contra.*

(*Reg. Lib. Min. App.* 1762.)

Purchase from his client by a solicitor, who was also trustee for the sale of the estate for payment of debts confirmed, upon the ground of his having attempted ineffectually to sell, of there being no fraud in the transaction, and of the purchase having been recognized and approved of by the *cestuy que trust*.

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THE bill in the former of these causes was brought by Sir *Robert Clarke*, to set aside a purchase made by the defendant *Swaile*, from his brother Sir *Samuel Clarke*, and to have the deeds delivered up, &c. ; the cross bill was to establish the purchase.

The late Sir *Samuel Clarke* was, in the year 1746, \* seised of estates in *Cambridgeshire* and *Suffolk*, which were much incumbered, and he had become, in consequence of his embarrassments, much involved in law-suits. The defendant *Swaile* was at that time first employed by him as his attorney and solicitor, and agent. In such capacity he recommended Sir *Samuel* to sell a part of his estate, and pointed out the manor of *Bramlingham* in *Suffolk*, as a proper part to be sold.

Accordingly, by indenture, bearing date the 27th and 28th of *July*, 1753, the premises were conveyed to *Swaile* and his heirs upon trust to sell, and to retain out of the purchase-money so much as would pay him for his trouble, and then pay off certain incumbrances therein mentioned, and that the residue of the purchase-money should be subject to Sir *Samuel Clarke*'s appointment.

It appeared in evidence, on the part of the defendant *Swaile*, that he had exerted himself considerably to sell the estate, but that he had not been able to meet with a purchaser.

By articles, bearing date the 22d of *November*, 1753,

*Swaile* agreed to purchase the premises for himself, and Sir *Samuel* covenanted to convey to him, on or before the 25th of *December* then next.

By indenture, bearing date the 6th of *February*, 1754, the premises were conveyed to *Swaile*: another deed, bearing date the 2d of *March*, 1754, was executed in consequence of a misdescription of the estate; and a third, bearing date the 15th of *March*, 1755, in consequence of a variance of the boundaries, to which the present plaintiff was a party. Sir *Samuel* died in *November*, 1758, three months after the filing of the bill: the suit was revived in *May*, 1760.

Mr. *Sewell* and Mr. *de Grey* for the plaintiff; the *Attorney-General* and Mr. *Perrot* for the defendant.

The Lord Chancellor said, that he did not like the circumstance of a trustee dealing with his *cestuy que trust*. That he thought, however, the objection so much relied on, that Mr. *Swaile* had not conducted the transaction with sufficient publicity, had not been made out. That, upon the whole, he did not see any principle upon which he could set the transaction aside. His Lordship relied also upon the circumstance of Sir *Robert Clarke* having recognized Mr. *Swaile* as lord of the manor of *Bramlingham* (a).

Both bills dismissed.

(a) It does not appear distinctly in what manner this took place.

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Lord *Rosslyn* had entertained an opinion that a sale to a person in the situation of trustee, should only be set aside where an advantage had been made by him. *Whichcote* v. *Lawrence*, 3 *Ves.* 740. *Ex parte Reynolds*, 5 *Ves.* 707. This doctrine has, however, since been disavowed. A *cestuy que trust* may, indeed, by a new contract, dismiss his trustee

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from that character, and if the obligation which attaches to the trustee, as such, be completely shaken off, he may buy; but even then the transaction will be watched with the greatest jealousy. But if it does not satisfactorily appear that the connection was dissolved, it is in the choice of the *cestuy que trust* to take back the property, whether the trustee has made any advantage of it or not. *Fox v. Mackreth*, 2 Bro. C. C. 400. 2 Cox, 158. 4 Bro. P. C. ed. Toml. 258. *Campbell v. Walker*, 5 Ves. 678. *M'Enzie v. York Buildings' Company*, 8 Bro. P. C. ed. Toml. 42. *Gibson v. Jeyes*, 6 Ves. 266. *Ex parte Hughes*, ib. 617. *Ex parte Lacey*, ib. 625, and the cases cited in the notes. *Ex parte James*, 8 Ves. 337. *Coles v. Trecothick*, 9 Ves. 234. *Ex parte Bennett*, 10 Ves. 381. *Morse v. Royal*, 12 Ves. 355. *Lowther*

v. *Ld. Lowther*, 13 Ves. 95. *Cane v. Ld. Allen*, 2 Dow. P. C. 289. *Attorney-General v. Ld. Dudley*, *Coop. Rep.* 146. *Webb v. Rorke*, 2 Sch. and Lef. 661. *Downes v. Grazebrooke*, 3 Meriv. 200. Long acquiescence under a sale to a trustee, is evidence that, as between the trustee and *cestuy que trust*, the relation had been abandoned, and that in all other respects it was fair. *Campbell v. Walker*, cit. sup. *Parker v. White*, 11 Ves. 226. *Webb v. Rorke*, cit. sup. But the mere circumstance of the relation having been abandoned, is not sufficient. The transaction must also be fair, as the situation of the trustee gives him the means of knowing the value of the property better than the *cestuy que trust*, and he acquires that knowledge at the expense of the *cestuy que trust*. 11 Ves. 226.

BASKETT v. CUNNINGHAM.

(Reg. Lib. A. 1761. fol. 337.)

17th June,  
1762.  
S. C.  
Bl. Rep. 370.

THIS was a bill brought by the king's printer for an injunction against the defendants, *Cunningham* and others, to restrain the publication of a book containing several statutes, or acts of parliament, entitled, "A Digest of the Statute Laws, containing the statutes at large, from Magna Charta to the end of the last parliament in 1760, in alphabetical order, together with such cases determined thereon as are necessary to explain them. By *T. Cunningham*, esq. Vol. I." The statutes were disposed and methodized under different heads, with large notes and references at the beginning and end of each statute or title, and in the margin.

Upon a bill brought by the king's printer to restrain the defendant from the publication of certain acts of parliament, &c., to which the patentees for printing law books were also defendants, the court refused to interfere between the contending patents, and therefore only restrained the defendant from printing at any other than a patent press.

The defendant *Cunningham*, had contracted with *Strachan* and *Woodfall*, the proprietors of the patent for printing law books, and it was printed at their press: they by their answer disclaimed all property in the work.

The *Attorney-General*, Mr. *Sewell*, Mr. *de Grey*, and Mr. *Comyn*, in support of the injunction.

In the late case of *Baskett* v. the University of *Cambridge* (a), the right of the plaintiff has been established exclusive of all other persons not authorized to print the same by prior grants of the crown. The notes subjoined to the present work are collusive, and calculated merely to shelter a pirated edition of the statutes.

Mr. *Perrot*, Mr. *Blackstone*, Mr. *Wilbraham*, and Mr. *Wedderburne*, for the defendants the publishers.

(a) *Burr.* 661. 1 *Bl. Rep.* 105.

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 CUNNINGHAM.

This book is not within the meaning of the letters patent, being a work of labour and industry, and in a method entirely new. But, independently of that consideration, there can be no ground for an injunction without determining the respective merits of the two interfering patents, both of which are sanctified by long usage. Though the law patentees in their answer disclaim any property in the work, and therefore the plaintiff does not seek an injunction against them, yet an absolute injunction cannot be granted against the proprietors without virtually including the law printers, for if they are forbid to print anywhere, they are also forbid to print at their press.

Mr. *Sayer* for the defendants *Woodfall* and *Strachan*.

*The Lord CHANCELLOR.*

I am of opinion that this work is entirely within the patent of the king's printer, and that these notes are merely collusive. But I shall not interfere between the two contending parties by the summary method of injunction, but leave them to adjust their rights in a due course of law. The injunction must therefore be to restrain the proprietors from printing at any other than a patent press (a).

(a) It is observed by Mr. Justice *Blackstone*, that as this was equivalent to a total injunction; the law printers secretly in league with *Baskett*, and were at the time jointly concerned in a new edition of the statutes, that this was equivalent to a total injunction; the law printers finding means to evade their contract with *Cunningham*.

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In the case of the Universities of *Oxford* and *Cambridge* v. *Richardson*, 6 Ves. 689, upon a bill brought by

the Universities to restrain the sale in *England* of bibles, &c. printed by the king's printer in *Scotland*, an injunction was continued to the hearing, though the king's printer in *England* did not join, but was made a defendant, there being no doubt of the illegality of what the defendants were doing. Vide *Osborne v. Donaldson*, post. 327.

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BASKETT  
v.  
CUNNINGHAM.

CAVE v. CAVE.

(Reg. Lib. A. 1761. fol. 406.)

GEORGE CAVE, the father of the plaintiff, by articles bearing date the 13th of *November*, 1757, entered into an agreement with the defendant *Rushworth*, for the purchase of certain lands in the parish of *Desborough*, in the county of *Northampton*, for the sum of £2200. Possession was to be delivered up on or before *Lady-day* then ensuing.

On the 22d of the same month he made his will, whereby he expressed himself in the following manner: "As for all such wordly goods as it hath pleased God to bless me with, I dispose thereof as follows:" he then gave and bequeathed unto his wife, the defendant *Mary*, and his two sons, *George* (the plaintiff), and *William Cave*, all his goods, cattle, chattels, and personal estate, and effects whatsoever, so long as his said wife should continue his widow; but if it should happen his said

14th May, &  
17th July, 1759.  
7th Nov. 1760.  
9th July, 1762.  
S. C.  
Aston, MSS.

A. having agreed to purchase a real estate, the purchase-money for which exceeded the amount of his personal estate, by his will, made a few days afterwards, attested by three witnesses, as to all the worldly goods that it had pleased God to bless him with, gave and bequeathed to his wife and two sons, all his goods, cattle, chattels, personal estate, and effects whatsoever; and in

case they died without issue, &c. gave the children's share of the personal estate and effects over: testator dying before the purchase could be completed: held, that the agreement ought to be specifically performed; and that the words of the will, being insufficient to comprehend real estate, the estate ought to be conveyed to the eldest son and his heirs, &c.



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wife should marry again, then he gave her only her own fortune again, to be at her own disposal, and all the residue of his goods, cattle, chattels, personal estate, and \*effects whatsoever, he gave and bequeathed to his said sons, *George* and *William*; but in case his said sons should die before they attained their respective ages of twenty-one years, and unmarried, and without issue, then he gave and disposed of their shares and parts in the personal estate and effects to be divided amongst his own brothers and sisters, and their children. The will was attested by three witnesses.

Soon afterwards, and before the agreement could be performed, he died, leaving the plaintiff his eldest son and heir at law. The present bill was brought to have the agreement carried into execution, and the land settled to the use of the plaintiff. The widow and the younger son insisted by their answer, that they were entitled to an equal share of the land with the plaintiff.

It had been referred to the Master to take an account of the personal estate of the testator at the time of his death, who reported, that after deductions for expenses, &c., it amounted to £2005 13s. 10d., being less than the sum agreed to be paid for the purchase-money. It now came on for further directions.

The *Solicitor-General* and Mr. *Caldecot* for the plaintiff.

There are two questions arise upon these facts. 1st. Whether this is not real estate; and 2dly. Whether, if it is so, it is devised by the words of this will. Upon the former point, since the case of *Lingen v. Sowray*, 1 P. W. 172, there can be no doubt but that it must be considered as land; the only question, therefore, is, are the words sufficiently extensive to comprehend real estate? The most extensive words are, "all my worldly goods." In *Tanner v. Wise*, 1 P. W. 74, it was said in-

deed, that a devise of all my worldly estate would pass a fee, but that determination turned upon the subsequent technical terms, the *rest* of all my goods, estate, and chattels whatsoever, *real and personal*. In the present case there are no exclusive words, as there were there, which designated the real estate. *Wilkinson v. Ferryland*, Cro. Car. 447, was like this, a devise of "personal estate and effects;" but it was held, that the adjective extended to both. In *Piggott v. Penrice*, Prec. Can. 471, the testatrix expressed herself thus: "I make my niece executrix of all my goods, *lands*, and chattels;" but even though the word land was used, the court held, that the real estate did not pass.

Mr. *Wilbraham* and Mr. *Ambler* for the defendants.

This is a case of very great hardship: the meaning contended for contradicts the testator's intention, which is so clearly expressed, and tends to the total disherison of his wife and child. Though the common equity in cases of contracts for purchase, where one of the parties dies, be that the contract shall be executed specifically, yet there may be cases where the circumstances will rebut that equity. So in an anonymous case, 2 Ca. Ch. 17, the court would not decree an agreement, because it was unreasonable; and in *Bromley v. Jeffereys*, Prec. Can. 138, the court said, that a court of equity is not obliged to decree a specific performance of all covenants or agreements, but will consider all circumstances, and actually refused to decree specific performance of an agreement. But even supposing that this agreement must be executed, there is nothing which shews that the testator did not mean the land to pass by this will. It is attested by three witnesses, which shews that he thought he was devising land (a). His personal estate, after payment of

(a) See the remarks on Serj., in *Roe v. Yend*, 2 N. R. this argument, by *Bayley*, 220, citing *Trent v. Hanning*,

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the purchase-money, would have been totally exhausted, and besides, it is not so large but that he must have been \*aware of that circumstance ; and yet, ten days after making this agreement, he executes his will, and leaves all his worldly goods to his wife for life, and, if she marries, her portion of £250. As Mr. *Rushforth* will exhaust the personal estate, these legacies must be charged on the real, and it will not be a sufficient objection that they are particular legatees.

*The Solicitor-General* in reply.

If a distinction cannot be found, the authorities must be adhered to. The first question is, was this in equity a real estate at the time of making the will? In equity, articles for a purchase must be carried into execution, as well for the heir as for the ancestor ; and as to the objection of the want of money to complete the contract, the court can supply that by directing a mortgage. 2dly. Does this land pass by the will? The words are not sufficient to indicate any intent ; there is nothing that alludes to real estates ; the limitations, though applicable to them, are not more so than to personal. As to the third question, the marshalling the assets, that is exclusively confined to debts and legacies, and cannot in the least apply to the present case.

*The Lord CHANCELLOR.*

This bill is brought by the plaintiff, an infant, the eldest son and heir of *George Cave*, deceased, against the widow of the testator, *William*, the younger son, and several others, claiming under the will of *George Cave*, and the representatives of *Rushworth*, who had articulated with *George Cave* for the sale of his estate in *Besbo-*

1 N. R. 116, and 7 East, 97, *Blanc, J.*, in *Doe. v. Dring*, and the observation of *Le 2 M. and S. 458.*

*rough*, to him by articles executed the 12th of *November*, 1757, on which articles he insists in his answer, and had in the most effectual manner, on his part, carried the articles into execution, he having quitted the possession of the estate.

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Now, articles for a purchase, if fairly entered into, have, in this court, a strict and original right to be specifically performed, because both the parties, at the time of entering into them, intend to change the qualities of their property, and in the general transactions and sense of mankind, on executing the articles, the purchase is considered as completed, provided a good title can be made, and the conveyance is taken as consequential. And taking it in this light as an intention of changing property, the same right exists as to a specific performance between the reciprocal representatives, as between the respective parties, and it is unnecessary to cite the authorities that warrant this rule.

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It was said, in the course of the argument, that, in a hard case, such as this is, the court would not decree a specific performance, and the case of *Bromley v. Jeffereys* was cited. But it is necessary to distinguish between a hard contract and a hard case. In the first, equity, which is a court of conscience, may refuse its assistance, but any hardships that arise from the execution, to one of the parties, is independent of the other, and ought not to affect them. And therefore the reason for not decreeing a specific performance in *Bromley v. Jeffereys*, was, that the contract was uncertain, and not mutual. But in this case there is no impeachment of Mr. *Rushworth's* conduct in this treaty ; it was, for aught that appears to me, a fair and equal bargain. And as he is a party to the suit, and insists on his contract, were there any difference between his right and that of the heir, which I do not

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think there is, no advantage could in this case be taken of it.

This equity, therefore, was so clear, that little was urged against it, and the principal labour of the defendant's counsel was, to claim under the will of the testator.

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The testator made his will the 22d of the same *November*, ten days after, and gives all his goods, cattle, chattels, personal estate, and effects whatsoever, to his wife and his sons, *George* and *William*, so long as his wife should continue his widow, but, if she marry again, only her own fortune. All the residue of his goods, cattle, chattels, personal estate, and effects whatsoever, to his sons, *George* and *William*, and if they die before twenty-one, unmarried, and without issue, then he gives and disposes their share in the personal estate and effects to be divided between his brothers and sisters, and their children.

Now, the personal estate being somewhat less than the purchase-money, and the contract having converted that into realty, unless the interest acquired passes by the will, the other child and the mother are totally unprovided for, which is repugnant, not only to the import of the will, which may often happen in case of insolvency, but to the capacity of the testator. And in this respect the case is singular, a case of commiseration, and therefore very disagreeable in the determination.

The first question, then, on the will is, whether the testator has used words to manifest his intent of passing this interest by the will? If such intent is manifest from the will, it signifies nothing in what mode it is expressed; it is the duty of this court, and of a court of law, to give it effect. But to collect such intent, unwarranted by the words, upon consideration of the testator's circumstances,

would be a dangerous example; and to pronounce that a testator intended so, because he ought so to have expressed himself, though he has not, would be *non jus dare, sed jus dicere*.

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The most extensive words laid hold on for the defendants, are, "And for all such worldly goods as it hath pleased God to bless me with, I dispose thereof as follows." Now, though I have consulted all the authorities cited, and others, I find none to justify me in extending that expression to a real estate, and yet those are but words of introduction in the will (a). The words of devise and bequest are words of enumeration, "goods, cattle, chattels;" collective words, as "personal estate, and effects whatsoever." The words of enumeration certainly do not comprehend realty; "personal estate" cannot; and "effects whatsoever", by natural and correct construction, must be applied to matters *ejusdem naturæ*, and without violation of established rules of law, the last words cannot be applied as general words to things of a superior nature to those particularly specified (b). I have

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(a) It is observed by Lord 8 T. R. 64. *Doe v. Allen*, *ib.*  
*Ellenborough*, in *Doe v. Lang-* 497. *Doe v. Child*, 1 N. R.  
*land*, 14 *East*, 372, "that very 335. *Doe v. Clark*, 2 N. R.  
little inference of intention 343. *Doe v. Clayton*, 8 *East*,  
can be drawn from mere words 144. *Goodright v. Barron*,  
of introduction; though we 11 *East*, 220, overruling *Ib-*  
certainly find them in some *betson v. Beckwith*, *For.* 157,  
cases called in aid to shew and *Maundy v. Maundy*,  
that a man did not mean to *Stra.* 1020, *Ridg.* 142.  
die intestate, as to any part  
of his property. See more  
upon this, *Loveacres v. Blight*,  
*Comp.* 356. *Denn v. Gaskin*,  
*ib.* 657. *Right v. Sidebotham*,  
*Doug.* 759. *Doe v. Wright*,

(b) See as to this, *Time-*  
*well v. Perkins*, 2 *Atk.* 102.  
*Roberts v. Kiffin*, *ib.* 113.  
*Moore v. Moore*, 1 *Bro. C. C.*  
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pondered on the words, to see if any justifiable transposition of them would indicate an intent of passing the realty. I can find none. I then endeavoured to accommodate the pointing to such an intent, and would have read it, "All my goods, cattle, chattels personal,—estate and effects whatsoever" (a). But this appeared to me to be a violation of the context, for it would exclude chattels real, and besides, "personal estate" is used as *nomen collectivum*, and the most general term to comprehend that kind of estate.

But what seems decisive of the intent on the will, and excludes all strained construction to serve a good purpose, is, that in the limitation over, where the testator resumes all he had before given, he calls it "the children's share of the personal estate and effects."

For these reasons, therefore, I am forced to be of opinion that the testator has not expressed himself in this will so as to indicate his intent of passing the interest he acquired under the articles.

It was further contended, that the defendants might stand in the place of Mr. *Rushworth*, as creditors on the estate to be conveyed by him for so much as is exhausted of the personal estate to make good the purchase; but

(a) For the doctrine upon this subject, and the application of the terms *estate, property, effects*, and similar expressions to real estate, vide Mr. Cox's note to *Barry v. Edgeworth*, 2 P. W. 523. *Hogan v. Jackson*, Cowp. 399. *Huxley v. Brooman*, 1 Bro. C. C. 437. *Doe v. Butler*, 6 T. R. 610. *Doe v. White*, 1 East, 33. *Camfield v. Gilbert*, 3 East, 516. *Doe v. Lainchbury*, 11 East, 290. *Roe v. Yeud*, 2 N. R. 214. *Doe v. Langlands*, 14 East, 370. *Doe v. Trout*, 15 East, 394. *Doe v. Dring*, 2 M. & S. 448. *Barnes v. Patch*, 8 Ves. 604. *Woollam v. Kenworthy*, 9 Ves. 137. *Nicholls v. Butcher*, 18 Ves. 193. *Doe v. Rout*, 7 Taunt. 81. *Doe v. Hurwill*, 5 M. & S. 18.

this is a position neither to be applied, nor answered ; for if it means anything, it is applicable to every case, and the legatee of the personal estate might say the testator shall not have power to lessen my funds.

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Upon the whole, the case amounts to this: the testator, having converted his personal estate into real, and made a will which reaches only to personal estate, has left his wife and younger son unprovided for, though he certainly meant them a provision. It is probable, too, that he thought this will would pass his new-acquired interest, but that is by no means certain. It is pretty difficult for men not of a mercantile education, and conversant in accounts, to have very correct notions of their personal estates: very many men have extremely inadequate notions of them, and therefore I have always thought with a very great judge, that it is dangerous to travel into men's circumstances in order to interpret their wills. It is a bias to the judgment of the court, and diverts the intention from what men *have* done, to what in like circumstances, the judge himself *would* have done (a).

I must therefore declare the articles well proved, and duly executed, and that they ought to be carried into execution, and that the personal estate be applied as far as it will go in payment of the purchase-money ; and that on payment thereof, or of so much as the personal estate will extend to pay, and on the residue, with the costs of all parties, being raised by mortgage, with the approbation of the Master, the estate, subject thereto, be, with the like approbation, conveyed to the infant and his heirs.

(a) As to the point of inquiry into the circumstances of testators, *vide* note *ante*, Vol. I. p. 44.



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The *Attorney-General* hoped the court would order the Master to see what was proper to allow the mother for maintenance of the plaintiff, her infant son, and direct him to make a liberal allowance, out of which she might support herself and her younger children. But the *Lord Chancellor* said it was consequential on the bill. *Ambler* then insisted that the widow would be a creditor for the £200 she brought in marriage.

*The Lord CHANCELLOR.*

There is no pretence for it. If, indeed, the will had taken effect, and there had been sufficient, she was, in case of a second marriage, to have the fortune she brought repaid her, but that was to be out of what was bequeathed.

22d, 23d & 25th  
June, 9th July,

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S. C.

Amb. 417.

Aston MSS.

INWOOD v. TWYNE.

(Reg. Lib. A. 1761. fol. 530.)

Where part of an infant's real estate was settled in jointure upon her mother, who being distressed, and about to sell her interest, a petition was presented, and the infant, upon a reference to the Master, and under an order of court, purchased it: she afterwards attained twenty-one, received a year's rent, and died: held, that the purchase, though made during infancy, was to be considered as real estate.

COLONEL *Inwood*, upon his marriage with the plaintiff, entered into articles, 3d June, 1732, to settle his estate on himself for life; remainder as to certain premises, part thereof to Mrs. *Inwood* for life for her jointure, with remainder as to all the premises to his first and other sons in tail male, with remainder to his own right heirs for ever. Colonel *Inwood* died in 1746, without having carried the articles into execution, leaving the plaintiff

his widow, and an only daughter, *Caroline Anna Maria*, an infant.


Upon his death the plaintiff entered upon the jointure lands, and afterwards being in distress, by indenture of lease and release, bearing date the 15th and 16th of *April*, 1755, between the plaintiff of the first part, *Thomas Bigs*, and three of her creditors, of the second part, and three other creditors of the third part, conveyed her jointure lands to them, their heirs and assigns, during her life, upon trust to sell.

The creditors being about to sell, a petition was presented by the infant and her uncle at the Rolls, setting forth, among other things, the assignment of plaintiff, and advertisement of sale; that such sale would be of great prejudice to her; and that her nearest relations apprehended that it would be for her advantage to purchase; that the mother, her next of kin, desired it, &c. Upon a reference to the Master, it was reported that it was her interest to purchase the estate, in regard that she had the reversion; and the mother, the next of kin, desired it, for the sum of £1100; and on the 13th of *April*, 1756, the trustees, in consideration of £1100, conveyed and released the premises to *James Bridges*, his heirs and assigns, during the life of *Annabella Inwood*. 7th *July*, 1756, *James Bridges*, for himself, his heirs and assigns, declared the purchase money to have been the proper money of the infant; and declared the trust to be for her benefit generally, without adding any words of limitation.

The daughter came of age on the 28th of *March*, 1760, and afterwards gave a letter of attorney to one *Collett* to receive the rents and profits of the estate: she died 22d of *March*, 1762, unmarried. The bill was filed by the plaintiff, as administratrix to her daughter,

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for an account of the rents and profits of the jointured estate.

*Wilbraham and Comyn* for the plaintiff.

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The question is, whether this interest belongs to the plaintiff as personal estate, or to the heirs by being merged in the inheritance? In the present case there is no merger at law, and there never is a merger in equity where there is none at law. *Thomas v. Kemys*, 2 Vern. 348. so in *Gwillam v. Holland* (a), cor. *Hardwicke*, C. 1741. The money with which this interest was purchased being the infant's, the interest continued personal estate till she came of age; and as she did nothing afterwards to alter the nature of it (for receiving rents alone did not make it real), it continued so till her death. There is no rule more certain than this, that guardians or trustees cannot alter the nature of an infant's estate. *Awdley v. Awdley*, 2 Vern. 191, *Mason v. Mason*, 1725 (b). As to her acts after she came of age, they only consisted in her receiving money which might have been either of real or personal estate.

*Sewell and Perrot* for the defendants.

It is nowhere laid down in such universal terms as that there is no case in which guardians or trustees can alter the nature of an infant's estate, particularly where it is so much for the advantage of the infant, as it is in the present case. That the court has power to do it may be collected from the case of *Earl of Winchelsea v. Norcliffe*, 1 Vern. 434. In this case the infant applied, on the event of the mother's assignment, to have it convert-

(a) Cit. ante, 116. *Annandale v. Marchioness of*

(b) This was the *Norfolk Annandale*, 2 Ves. 384. vide case, mentioned by Lord 1 Ves. jun. 457. *Hardwicke* in the *Marquis of*

ed; and upon such application an order of this court was founded. After all, it is admitted, that on her coming of age she received the rents and profits, and executed a power of attorney, which was a confirmation of the purchase of the real estate.

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On the 25th of *June*, as the *Lord Chancellor* was proceeding to give judgment, *Wilbraham* desired to be heard again; the cause was accordingly put off to the 9th of *July*, when, in addition to his former arguments, he relied on the constant practice of the court in similar cases not to alter the nature of an infant's property; as where there is a charge by a term of years on an infant's estate, and it is discharged out of his personal estate during his minority, the court never permits the term to merge, but orders it to be assigned to a trustee for the infant, his executors, &c.; so in the case of *Lord Leigh*, where, by savings or otherwise, the trustees were enabled to purchase several farms which lay contiguous; the purchases having been made with the approbation of the court, there was an express provision, that if he died under twenty-one it should be deemed personal estate. So in a private act of parliament for purchasing during the minority of *Lord Plymouth*, it was to him and his executors, &c. till twenty-one, with a proviso that on his attaining twenty-one, he may call on the trustees to convey to him and his heirs. *Walter v. Walter*, 3 P. W. 99.

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*The Lord Chancellor.*

You need make no apology for desiring to speak to this matter a second time, as so important an interest of your client depends upon the question.

The question arising upon this bill is, whether *Mrs. Inwood*, the plaintiff, as administratrix of the daughter,

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is entitled to the profits of these farms for the life of Mrs. *Inwood*, as part of the personal assets of the daughter ; or the defendants, as her heirs ?

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The case in effect is no more than this : 3d *June*, 1732, Mr. *Inwood* articles to settle his estate, as far as concerns the present question, on himself for life ; remainder to his wife for life ; remainder to his first and other sons in tail male, with reversion to himself in fee. Mr. *Inwood* dies, leaving one only daughter, and, 16th *April*, 1755, Mrs. *Inwood* conveys by lease and release this estate of hers to Mr. *Bigs* and others, and their heirs, for the benefit of themselves and the rest of the creditors. The creditors propose a sale of this interest, in order to turn it into money. Upon this it appears, by order 26th *March*, 1756, that a petition was preferred on behalf of the infant, with the consent of her mother, her only next of kin, signing the petition, suggesting that it would be for the infant's benefit to purchase, and have the purchase money paid out of the personal estate ; and praying a reference to the Master to inquire into the fitness of the proposal, and to have the money paid by the Accountant-general out of her stock, amounting to 9 or £10,000. The Master approves the purchase, appoints a receiver of the real estate pursuant to the decree, and takes an additional security, in consequence of the augmentation of it by this purchase. 31st *March*, 1756, Mr. *Bigs* and the other grantees convey to Mr. *Bridges* and his heirs the very estate granted to them. 7 *July*, 1756, Mr. *Bridges* declares the purchase-money was the money of the infant, and declares the trust of his conveyance for her. The infant lived to attain twenty-one ; entered on the estate of which she was actually seised in fee, received the rents, and appointed her steward to receive and recover them.

Notwithstanding this, it is said that this must be con-

sidered of the nature it originally was, and in lieu of which it came, the £1100 personal. Besides, it is said to be a general rule in equity, that no person or means can convert an infant's personal estate into real, or *vice versâ*, so as to bind such infant. This is a point of very great consequence, and if there is any such general rule it ought to be adhered to; but the rule is quite otherwise, and reason as well as practice are in direct opposition to it; and indeed it is absolutely necessary that it should be so.

Now to consider this position step by step, and first with regard to trustees or guardians of their fortunes. I do not know any such general rule. I can conceive many cases where a conversion of such estate might be made by trustees or guardians, and that this court would support and approve their conduct; and it would be strange to say, that trustees would be censured in this court for doing what the court would have ordered to have been done.

I am very sure that it is a power which this court has exercised, and which I have in substance executed, without any provision to retain the former quality, or without any dispute upon it. Indeed, it seems to be admitted that in both cases, if for the benefit of the infant, it may be done.

If this court cannot dispose of the infant's personal estate, and convert, there would be an end of the question. But I am of opinion that the court, which stands in *loco parentis*, may dispose of such money for the benefit of the infant, so as to make it real even during the infancy; and if the court can do this, it appears to me, in the present case, that the court and all the parties intended to do so, and it was for their benefit that it should have been so done. The court knew that the infant had the fee of the whole estate, and that nothing stood out against her, but the wife's equitable estate for life.

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The consequence of this was, that nothing but an equity could be conveyed to the infant's trustee, and the conveyance of a partial equity to a person possessed of a pure legal fee can operate only by way of extinguishment; and it seems clear to me, that the moment Mr. *Bridges* declared the trust for the infant, his estate vanished, and he had no longer any interest in him, nor she any remedy in this court against him.

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The case of the Earl of *Winchelsea* v. *Norcliffe*, 1 *Vern.* 435. as to the power, authority and practice of the court, is in point; for there the Chancellor agreed with the Master of the Rolls, that if the trustees had obtained a decree for investing this money in a purchase, the court would have maintained the decree, but adhered to that which I take to be the general rule, that trustees could not at will and pleasure convert personal to real, and very properly considered *that* as no purchase for the infant, it only being to be so on his election. In that case there was no question on the validity of the purchase but between executor and heir, so that what the court did on that subject is merely applicable as to its being real or personal during the minority.

If I were to decree for the plaintiff in this case, I should act contrary to her own petition, and contrary to the direction of the judge who made the order upon that petition.

I have said all this on the supposition that she had died under twenty-one; but, in truth, she lived to attain that age, acted as owner, received rents, &c. and executed a letter of attorney appointing a receiver. If this be not a confirmation, I know not what is. Where is the line to be drawn? Must she live three days, three months, or three years after twenty-one? In the present case, therefore, if there could have been any doubt upon the other point, the bill must be dismissed on this.

Where a person is acting *bona fide* for a lunatic or an infant, without any intention to prefer either representative, there is no equity between them; and so, where a stranger had cut down timber tortiously, it was refused to be restored to the estate, because there was no abuse \* of confidence. *Ex parte Bromfield*, 3 Bro. C. C. 510. 2 *Dick*, 762. 1 *Ves. jun.* 453. *Vernon v. Vernon*, cit. *ib.* *Ex parte Grimstone*, Amb. 706. and more correctly stated 4 Bro. C. C. 234. *Ozenden v. Lord Compton*, *ib.* 231. and

2 *Ves. jun.* 69. *Flanagan v. Flanagan*, cit. *ib.* As to the doctrine of the court in directing timber to be sold, land-tax to be redeemed, &c., and the distinction between its practice with regard to infants and lunatics, *vide Ware v. Polhill*, 11 *Ves.* 237. *Ex parte Philips*, 19 *Ves.* 118. *Vide also Mildmay v. Mildmay*, 4 Bro. C. C. 76. *Ashburton v. Ashburton*, 6 *Ves.* 6. *Delapole v. Delapole*, 17 *Ves.* 150. *Wickham v. Wickham*, Comp. 288. 19 *Ves.* 419. *Osborne v. Osborne*, *ib.* 423. *Hussey v. Hussey*, 5 *Mad.* 44.

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ROBINSON v. KNIGHT.

(Reg. Lib. Min. App. 1762. (a))

18th & 19th  
February, 1761.  
12th July, 1762.  
S. C.  
Amb. MSS.  
Aston, MSS.  
Serjt. Hill, MSS.

LADY ARABELLA HOWARD, by her will, bearing date the 20th of June, 1746, devised (*inter alia*) as follows:

Where testatrix by will directed a sum of money to be laid out in

land, and settled, after some previous limitations, on her own right heirs, and afterwards made a general residuary devise of all her real and personal estate: held, that upon the evident intent of the testatrix to exclude the residuary devisee, the heir at law was entitled to a remainder in fee in the lands to be purchased.

(a) There is no notice taken of this decision in the Register's book, owing, probably, to the circumstance mentioned by Mr. Justice Aston in his report of this case, viz. that the parties had privately agreed to divide the money before the decree was pronounced, each to take



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“ Item, as to all the principal money which now is, and which shall be due and owing to me from *Edward Webb* on the manor of *Horecross*, and other his lands in the county of *Stafford*, and all interest which shall be due for the same at the time of my decease ; and as to the principal sum of money due to me from *Arthur Dabbs*, and all interest which shall be due for the same at the time of my decease, I give the same respective sums of money unto *Philip Howard*, *Ralph Knight*, and *Edward Webb*, their executors, administrators and assigns, upon trust, to be laid out in one or more purchases of lands, &c. in *England*, which when purchased shall be, and are hereby directed to be so settled upon *Sir Edward Alleyn* as tenant for life (with certain powers to him given) ; remainder to his first and other sons in tail male, and, for want of such issue, to the use of my own right heirs for ever.” She then proceeds to give several specific and pecuniary legacies, and concludes, “ All the rest and residue of my estate, both real and personal whatsoever and wheresoever, I give the same unto the said *Ralph Knight*, his heirs, executors and administrators, for his and their own use and benefit.”

*Sir Edward Alleyn* being dead without issue, this bill was brought by *Mr. Robinson*, the cousin and heir at law of *Lady Arabella*, against *Mr. Knight*, her sole surviving executor, and residuary legatee and devisee, to have the money, which amounted to £21,000, to be paid to him.

The *Attorney-General*, *Mr. Hoskins*, *Mr. Perrot*, and *Mr. de Grey*, for the plaintiff.

The subject of the present devise was money at the

£9000 ; and that out of the and the residue go to the remaining £3000 the costs on party in whose favour the decree was made. both sides should be paid,

death of the testatrix, directed to be laid out in land, under a particular designation. There was no devisable interest in her upon which the residuary clause could operate: it would not have been real assets by descent upon the heir. The devise to the heir is opposed on the ground that no one can make his right heirs purchasers without departing with the whole estate; but here this was a new use limited to the plaintiff, as no use whatever existed in *Lady Arabella, Tippin v. Cosin, Carth.* 272. the heir must therefore take by purchase. The sole ground of the defendant's claim is upon the residuary clause, but that cannot comprehend anything before devised; and it has been repeatedly decided that it is different from personal estate, and shall not fall into the *residuum*. *Goodright v. Opie*, 8 *Mod.* 123. *Roe v. Fludd*, *Fortesc. Rep.* 184. *Doe v. Underdown*, 15 *Geo.* 2. (a). *Sprigg v. Sprigg*, 2 *Vern.* 394. In *Amesbury v. Brown*, 25 *May*, 1750, Lord *Hardwicke* held, that a reversion did not pass by a residuary clause, and that though a devise may not operate to make the heir take by purchase, yet it is in the nature of an exception out of the residuary clause.

The *Solicitor-General*, Mr. *Wilbraham*, Mr. *Taylor White*, and Mr. *Filmer*, for the defendant.

Here was not originally a disposition of the whole interest of the testatrix: the remainder in fee was a reversion which continued in her: it was the old use, and not a new one. Earl of *Bedford's* case *Mo.* 718. It is a well established principle at law, that no one can devise to his own right heirs without departing with his whole estate. *Co. Litt.* 22 *b.* Here the testatrix did not depart with her estate by the devise to her heirs; it continued in her, and is operated upon by the general devise

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of the *residuum*. In *Amesbury v. Brown* there was a strong indication of intent in favour of the heir; in the present case the intent seems equally strong to favour the residuary legatee. In *Doe dem. Dodd v. Russel*, Mich. 1757 (a), testator had devised several specific devises, with limitations to his own right heirs in the case of one dying in the life of the testator, it was held that the residuary devisee should take.

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*The Lord Chancellor.*

12th July.

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The question in this cause arises out of the will of Lady *Arabella Howard*, and is, whether, upon the true construction of it, a sum of about £21,000 belongs to the plaintiff or defendant. Both claim under the same instrument, and as it is a will, both must derive from the intent of the testatrix, as the same may be collected from her expressions. The will, so far as it concerns the present question, is to this effect. (States the will.)

Upon this state of the will, the only consideration is, whether this remainder in fee, intended to be limited on the estate given to Sir *Edward Alleyn* and his sons, will go to the plaintiff, the heir at law; or whether the testatrix intended to comprise it in the residuary clause, and give it to Mr. *Knight*, the defendant: and so it becomes merely a question of intent, for she might have disposed of it in which of the two modes she thought proper.

Now to find the intent of the testatrix, let us consider this will step by step. She was possessed of, or entitled to, a very considerable personal estate, part of which she intended, after her death, should be converted into land: for this purpose she gives the sum in question absolutely to her trustees, their executors, administrators and as-

(a) Cit. *Bl. Rep.* 737.

signs ; and directs them, after her death to purchase land with it, and to settle it on Sir *Edward Alleyn* for life ; remainder to his first and other sons in tail male ; remainder to her right heirs. Thus far her intent, beyond a doubt, seems to be, that the trustees, after her death, should receive this sum of money : that they should convert it into land, and settle the fee of such land to particular uses, and the remainder to her heirs at law ; an intent not repugnant to any rule of law or equity.

It was argued, indeed, for the defendant, that the direction of this trust, as to the remainder in fee, was destitute of meaning ; and that there was no disposition of the fee at all, but that it remained in the testatrix till she came to the residuary clause, and disposed of it to the defendant, Mr. *Knight* : and this was grounded on the rule of law, that no man seised of an estate can make his right heirs purchasers ; but I do not think that rule applicable to the present case, and if it were applicable, I do not think it conclusive to the merits between the present parties.

I agree that a person seised cannot make his right heir a purchaser ; for the estate, *quoad* the right heirs, remained in the owner, and will descend as a reversion ; but here there never was any real interest to vest in the testatrix ; the conversion of the estate was to be after her death, and whoever takes under the settlement directed to be made will take a new created interest, which never did, and never was intended to vest in the testatrix, and therefore cannot take but as purchasers. Suppose, in this case, the residuary clause had been penned thus : “ All the rest, residue, &c. except the money intended to be laid out in land ; ” there could then, as I conceive, have been no dispute, but that this court must have directed a limitation to Sir *Edward Alleyn* and his sons, remainder to the right heirs of Lady *Arabella Howard*, which would

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The rule that a man cannot make his right heir a purchaser is confined to the estate of which he is seised.

have vested in the plaintiff as a purchaser, and gone to his heirs *ex parte maternâ* in default of heirs *ex parte paternâ*; and therefore the rule is confined to the estate of which a man is seised. For though a man cannot make his right heir a purchaser of that estate, he may of another. He may contract for an estate by way of remainder, after particular estates, to his own right heirs, which will be a contingent remainder, and vest in the right heirs as purchasers if the ancestor is dead when the particular estate determines.

But, as I said before, I think if this came within the rule of law, and was the case of a real estate of which the testatrix had been seised, it would not have been conclusive to the question between the parties, which is, did the testatrix intend this for the heirs at law, or for the residuary legatee and devisee? Now for that purpose the case of *Amesbury v. Brown* is a case in point, and is thus as I have taken it from the Register's book. "*George Pots*, seised of an estate called *Trewhit*, by will, bearing date the 8th of *January*, 1741, gave to his sister *Ann* £200, to his sister *Christian* £200, and to his nieces *Ann Robson* and *Ann Godwin* £200 each, and to his sister *Mary Pots* £200, to be paid out of his estate; and gave to his sister *Mary* all the remainder of his said estate in tail general; remainder to his own right heirs, and all the rest and residue of his estate, goods, and chattels, both real and personal, he gave to his sister *Mary*, and appointed her sole executrix. The plaintiffs, with *Mary*, were the testator's heirs at law; *Mary* intermarried with the defendant, *Brown*, and died without issue: plaintiffs claim to be let into possession as heirs at law. *Mary*, before her marriage, by deeds and fine, conveyed to the defendant and his heirs, subject to a term to discharge the incumbrances, whereby he became well entitled to the fee-simple and inheritance of the said estate. *Mary*,

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being by the will tenant in tail, with reversion in fee to herself, the court decreed the plaintiffs entitled to redeem, and gave directions accordingly; and upon redemption directed a conveyance accordingly." The principle upon which that case was determined was on the intent, that it was not intended to be comprised in the residuary devise, though there it was certain that the remainder was void, and that the heirs at law took by reverter and in descent.

And it seems to be built on the cases determined at law, that a remainder void by lapse shall not fall into the residuary clause. Those cases are founded on sound reason, and I wonder that there was much difficulty about them; for where a man disposes of his whole interest in one thing, and gives the rest and residue of his possessions to another, it is very forced and absurd to suppose that by the words *rest and residue* used at the same instant, he meant a residue not existing, but which might by possibility exist. To this way of reasoning, indeed, is objected the case of personal estate, where the contrary doctrine prevails; but the true answer to that is, that the law, either from the words of the statute of wills, or from its favour to the heir, real property being in those times the material or general object of the law, has determined that a will speaks *quoad* the real estate from the time of making it, *quoad* the personal from the death of the testator; and that principle being fixed, the contrary and respective resolutions not only may be derived, but result; and that principle has been fixed from *Brett v. Rigden* (a) to the present time. If the supposition, therefore, that when a man has intended to dispose of his whole or any part of his estate, he meant to comprehend *that* in the residue, be forced and strained; how much more so to suppose it in the present case, where there did not exi

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(a) *Plowd.* 340.

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a possibility, while the will stood, of the remainder ever reverting to the testatrix.

I am, therefore, of opinion for the plaintiff, the heir at law; and it must be referred to the Master to take an account of what was due at the death of the testatrix for principal and interest of the respective principal sums due from Mr. *Webb* and Mr. *Dabs*, and the same are to be invested in the purchase of lands, with the approbation of the Master, and settled according to the directions and to the uses of the will, with a remainder in fee to the plaintiff and his heirs.

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The present case and *Amesbury v. Brown* were cited and approved of by *de Grey*, C. J., in *Smith* dem. *Davis v. Saunders*, Bl. Rep. 736. where it was laid down, that a residuary clause would extend to every latent reversion which the testator might have in him, unless it were expressly excluded by devise to some other person; that in case such latter devise be to the testator's own right heirs, although they cannot take as purchasers, yet as the whole

is merely a question of intention, it will equally operate as an exclusion of the residuary devise. The same point was afterwards decided upon the same will in *Doe* dem. *Davis v. Saunders*, Comp. 420. A similar principle was attended to in the decision of the case of *Goodright* dem. Earl of *Buckinghamshire v. Marquis of Downshire*, 2 Bos. & Pul. 600. Vide also *Doe* dem. Earl *Cholmondeley v. Weatherby*, 11 East, 322.

DONISTHORPE v PORTER.

(Reg. Lib. A. 1761. fol. 356.)

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July,  
1762.  
S. C.

Amb. 600.

*RICHARD PORTER*, by indenture of lease and release, bearing date the 14th and 15th *June*, 1717, conveyed certain freehold estates to the use of himself for life; remainder to his wife for life; remainder to trustees for 100 years; remainder to himself in fee. The trust of the term was declared to be by perception of the profits, or by mortgage, or sale, with all convenient speed, to raise £1000, to be equally distributed among the younger son or sons, and the daughter and daughters of the marriage, and be paid to them at their respective ages of twenty-one or days of marriage; with a power of revocation upon *Richard Porter's* purchasing and settling other estates of the yearly value of £25 in the same way.

*Richard Porter* died in 1747, without having revoked the uses, leaving *Elizabeth*, his wife, *Richard Porter*, his only son, and *Margaret*, his only daughter: having made a will, and disposed of his personal estate, but not of his real estate, so that at his death the real estate descended to his son, subject to the uses of the settlement. The son paid the interest of the £1000 to his sister. *Elizabeth* the wife died, and *Margaret*, the daughter, afterwards died in *July*, 1758, intestate, leaving *Richard*, her brother and only next of kin. In *October*, 1758, *Richard Porter* died intestate, leaving *Robert Porter*, his heir at law, and the plaintiff, *Catherine*, his next of kin.

The bill was brought to have the £1000 raised under the 100 years term.

The *Attorney-General* and *Mr. Hoskins* for the plaintiffs.

Where a person is entitled to a sum of money charged upon an estate, and secured by a term of years, and afterwards becomes entitled to the fee-simple of the estate, a court of equity extinguishes the equitable lien, except in the case of creditors or of infancy.

Where heir inherits a mortgaged estate, if he executes a new covenant and bond, with a new equity of redemption, he makes the debt his own, and his personal estate shall be primarily liable.

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Mr. Sewell, Mr. de Grey, Mr. Wilbraham, and Mr. Bicknell, for the defendant.

*The Lord CHANCELLOR.*

Here are two questions ; First, Whether the £1000 ought to be raised by aid of this court ? Second, If to be raised, whether it ought not to be applied to exonerate *Richard Porter's* estate of the mortgages which he has made a debt of his own ?

The first is a question of consequence. I do not find that the counsel have cited a decision in point ; yet, on grounds of general practice, I am, perhaps, better satisfied than I should be if I depended on authorities. It is a case of consequence, because it may frequently happen in families: it might, if determined for the plaintiffs, revive dormant claims in families. I think cases of consolidating rights in equity are reducible to a firm foundation. I do not think it a rule, that a charge upon an estate which can only be got at by trustees, and so be prevented from merging at law, shall be distinct in equity, and go to the administrator, while the estate goes to the heir ; but, I think, where the owner has an absolute interest in the estate and charge, the charge is annihilated for the benefit of the estate and heir. The court does not consider the subtilties of mergers, but discharges the estate from the incumbrance ; it would otherwise burthen estates to no purpose.

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There are, however, two exceptions : first, the case of creditors, which arises from the power and justice of this court correcting the illiberality of law with regard to creditors, which permits a man to die insolvent, leaving a very good estate. The second is that of infants.

As to mergers, a court of law cannot look into rights or beneficial interests, it merges estates lying in the same person, but cannot where they lie in different persons :

equity does not regard that, but looks into the beneficial interests and views of parties, whether the estates are strictly in the same person or in different persons (a).

The second point is as clear. Where an heir inherits a mortgaged estate, he makes the debt his own by covenant and bond, and a new equity of redemption: his personal estate is therefore liable to pay; he has by his own act willed it so (b).

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Bill dismissed.

(a) *Vide Price v. Gibson*, leaving an estate subject to ante, p. 118. and note to it. an incumbrance, if the mortgage be transferred by the son, the transaction is no more than the purchase of an equity of redemption; the incumbrance does not become his debt, and even his personal covenant will not have that effect, being considered merely as a covenant for indemnity. But if there is any thing which raises a new contract, if there is any personal dealing, a new debt is thereby constituted, to which the personal estate is liable. *Tweddell v. Tweddell*, 2 Bro. C. C. 101. 152. *Billinghurst v. Walker*, ib. 604. *Woods v. Huntingford*, 3 Ves. 128. *Butler v. Butler*, 5 Ves. 534. *Waring v. Ward*, ib. 670. & 7 Ves. 332. *Earl of Oxford v. Lady Rodney*, 14 Ves. 417.

(b) As to those cases in which the land, though originally only the auxiliary fund to the personal estate of the original contractor, becomes the primary fund, as between it and the personal estate of any other person who takes the land subject to the charge, and those where such person, by making a new contract, renders his own personal estate liable; vide *Bagot v. Oughton*, 1 P. W. 347. *Edwards v. Freeman*, 2 P. W. 435. *Leman v. Newnham*, 1 Ves. 51. *Robinson v. Gee*, ib. 312. *Parsons v. Freeman*, Amb. 115. and the cases cited in Mr. Cox's note to \**Evelyn v. Evelyn*, 2 P. W. 664.

So where a person dies,

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July 21, 1762.  
S. C.  
Sewell, MSS.

SURMAN v. BARLOW.

(Reg. Lib. B. 1761. fol. 346.)

Where in the office copy of a will a whole line of the original had been omitted, but the sense was left in such a manner as to give reason to suppose that the original contained a limitation in tail of real estate: held, that this was sufficient to put a purchaser upon inquiry.

*WILLIAM BARLOW*, the elder, being seised in fee of certain real estates in the county of *Pembroke*, after giving divers legacies, devised as follows: "and, lastly, I do nominate, constitute and appoint my son, *William Barlow*, to be my sole executor to this my last will and testament, and to possess and enjoy all my real estate and personal goods of what nature or quality soever, to pay my debts, and receive what may be due to me; and in case he die without issue lawfully begotten, that it fall between my three daughters and their children."

*William Barlow*, the son, upon the death of his father, proved the will in the Ecclesiastical Court; but in making out the copy of it, the officer left out the words "in case he die without issue."

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*William Barlow*, the younger, never suffered any recovery of the premises; but by indentures of lease and release, bearing date 23d and 24th of *August*, 1723, he settled the premises upon the defendant, *Lettice Barlow*, his wife, for life, as her jointure, and in bar of dower, with remainder over. *William Barlow*, the younger, being dead without issue, and the defendant, *Lettice Barlow*, being in possession of the premises, this was a bill by his heirs at law for an account of the rents and profits, and that she might deliver up possession; the bill offered to assign to the said defendant, *Lettice*, dower out of the clear yearly value of the premises, she accounting for the rents by her received since the death of her husband.

The defendant, *Lettice Barlow*, by her answer stated, that in the treaties previous to her marriage with the said *William Barlow*, he affirmed that he had power to settle the said premises in manner aforesaid without any recovery; and that he produced some writing purporting to be his father's will, and annexed to the probate thereof; and on perusing thereof, the defendant was advised that he could make such settlement without suffering a common recovery, and that she never suspected the contrary, or that he was tenant in tail, until plaintiff setting up some claim to the premises, defendant caused the said copy to be compared with the original, when the defendant was informed that a whole line was left out of the copy which was very material, and drew the persons with whom the defendant advised into the opinion aforesaid.

The cause coming on for hearing at the Rolls, his Honour, on the 14th of *December*, 1761, declared, that the said premises were free from dower and jointure; and as to so much of the said bill as the said defendant has recourse to as tantamount to a voluntary offer of dower, such parts as were insisted upon did not amount to a voluntary offer of dower, and did not appear to have been intended to give the widow anything more than she might otherwise appear to be entitled to; and that even supposing any such voluntary offer had been made, the defendant, the widow, not having accepted thereof, but having all along persevered in claiming in contradiction thereto, was not entitled now to have recourse to such offer.

This was a petition of rehearing presented on the part of the said *Lettice Barlow* from the above decree.

The *Attorney-General* and Mr. *Jones* for the defendant, *Lettice Barlow*; Mr. *Perryn* in support of the decree.

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*The Lord CHANCELLOR.*

I think this the strongest notice that could be given of a fact, parol notice, indeed, would have been sufficient. Such parol notice, accompanied with the probate, was, I think, in the present case, notice of the will, and also that it related to real estate. The word "begotten" shewed that there was a limitation of the real estate: the probate, in the present case, is to be considered as no more than a parol notice or a letter. It would be very dangerous to consider this as the authentic contents of a will, especially as it now appears what little care these inferior courts take (a). As to the offer of dower, I think it was conditional, and made on the ground of being let into possession: I must therefore affirm this decree.

(a) As to constructive notice, *ante*, Vol. I. 356. and the note *vide Howorth v. Deem*, to it.

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26th July, 1762.  
S. C.  
Amb. 421.

HUGHES v. GARTH.

(Reg. Lib. A. 1761, fol. 523.)

Plea of purchase from one having a reversionary estate, and consequently not in possession, overruled, because it did not set out how the person from whom the title was deduced became entitled.

*JOHN DREW* being seised of a small estate at *Devises*, died intestate in the year 1737, leaving the three daughters of *Robert Drew* his heirs at law. This was a bill by the plaintiff, who had married one of the daughters, stating, that the plaintiff's wife before marriage, and in consideration of a settlement, had conveyed to the plaintiff in fee, and for an account.

To this bill the defendant, *Garth*, put in a plea, stating, that *Robert Drew* being, or pretending to be seised of the estate in fee after the death of *John Drew*,

in consideration of £300, conveyed the same to *John Flower*, and then set out divers mesne conveyances so as to bring the estates to himself in 1747.

Mr. *Ambler* and Mr. *Capper* in support of the plea; Mr. *Sewell* and Mr. *Coxe* for the plaintiff.

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*The Lord CHANCELLOR.*

The plea does not state how *Robert* became entitled to the reversion, and is therefore improper. This being a title to a particular estate, and *Robert* not being in possession at the time of the conveyance, it ought to have done so. It must stand for answer, with liberty for the plaintiffs to except.

*Vide* the case of *Walwyn* the vendor was in possession. v. *Lee*, 9 Ves. 24. *Daniels* Et vide *Beames's Elements of* v. *Davison*, 16 Ves. 252. as to Pleas in Equity, 236, 237. the necessity of averring that

*l. r. 5-176 683.*

MARTIN v. HEATHCOTE.

(Reg. Lib. A. 1762. fol. 117.)

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February 8th,  
1763.  
S. C.  
*Sewell*, MSS.

THIS was a bill for an account of certain mercantile transactions: the defendant, by his answer, insisted that none of them were within six years from the filing the bill, and insisted upon the statute of limitations (a).

The *Attorney-General* and Mr. *Bicknell* for the plaintiff; Mr. *Sewell* for the defendant.

Merchants' accounts, after six years total discontinuance, within the statute of limitations.

(a) 21 Jac. 1. c. 16.

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*The Lord Chancellor.*

Merchants' accounts, after six years total discontinuance of dealings, are as much within the statute of limitations as other accounts. The difference between merchants' accounts and those of other persons is, that a continuation afterwards will prevent the statute running against the former accounts, but will be a bar as to all articles before six years in other accounts.

Bill dismissed.

Great doubts have been entertained on this point. Lord Hardwicke, in *Welford v. Liddel*, 2 Ves. 400. noticed the difficulty of the construction to be applied to this exception in the statute: his Lordship, however, considered the intention of it to be, to prevent dividing an account where it was still running, and part of it might have been within the time, and part before; but where the account was closed and concluded between the parties, and the dealing and transaction over, he was of opinion that the statute might be pleaded.

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In *Catling v. Skoulding*, 6 T. R. 193. there is a *dictum* of Lord Kenyon's, that in the case of merchant's accounts a

plaintiff is not barred, though there has been no transaction of any kind between the parties for six years. Lord Rosslyn, however, upon that *dictum* being cited before him in *Crawford v. Liddel*, cit. 6 Ves. 582., expressed himself of an opposite opinion; which is supported by the late case of *Barber v. Barber*, 18 Ves. 286. To these authorities may be added the principal case, and that of *Bridges v. Mitchell*, Gilb. Eq. Rep. 224.

The point was much discussed in *Jones v. Pengree*, 6 Ves. 580. *Duff v. the East India Company*, 15 Ves. 198. *Foster v. Hodgson*, 19 Ves. 185. See, also, the very elaborate note of Mr. Serjt. Williams to the case of *Webber v. Tivill*, 2 Saund. 121.

COUNTESS OF LONDONDERRY v. WAYNE.

(Reg. Lib. A. 1762. fol. 207.)

8th, 9th & 10th  
February,  
1763.  
S. C.  
Amb. 424.

ROBERT GRAHAM, by his will, bearing date the 21st of June, 1721, devised his estates in *Southwarmborough* and *Crunsdell*, in the county of *Southampton*, to his eldest son, *Robert*, for life; with remainder to his first and other sons in tail male; with remainder to the testator's second and third sons, and their issue male, in the same manner, with remainder in fee to his own right heirs, \*with a power for his sons, when in possession, to make a jointure of any part of the said estates not exceeding the yearly value of £400.

By articles, bearing date the 9th of November, 1732, made previous to the marriage of *Robert Graham*, the younger, with the plaintiff, Lady *Londonderry*; he covenanted for himself, his heirs, and executors, within six months after the marriage, to convey lands and tenements of inheritance, &c. in possession, in the manors of *Southwarmborough* and *Crunsdell*, of the yearly value of £400, "clear of taxes and reprises," on himself for life; remainder to the plaintiff for life, with remainder on the issue male of the marriage.

By indentures of lease and release, bearing date the 22d and 23d June, 1733, and made after the marriage, reciting the will of his father and the articles; and that the said settlement was made in pursuance of the same, and in execution of the power in the will of his father; the said *Robert Graham*, the younger, conveys certain farms in *Southwarmborough* and *Crunsdell*, expressed to be of the yearly value of £406, and also a pension of

Husband having a power to make a jointure of any part of the estate not exceeding 400*l. per annum*, covenants on his marriage to settle lands of the yearly value of 400*l. clear of taxes and reprises*: he afterwards makes a settlement of lands, with a covenant, that if they should fall short of 400*l. per annum*, he would make up the deficiency: held, that the settlement was intended as an execution of the power, and the making the jointure *clear of taxes and reprises* in the articles was a mistake.

Where lands of a specified annual value are settled in jointure pursuant to a power, the value is to be estimated at the death of the husband.



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£4 *per annum*, payable out of a rectory, out of which the sum of £12 *per annum* was allowed to the tenant for botes, which reduced the said settlement within the power. There was also a covenant, that if the premises, by means of an annuity of £200, payable to his mother (and which was a charge on all the estates), or by any lawful eviction or incumbrance, should fall short of the yearly value of £400, it should be made up out of other lands devised by his father, and within the power.

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*Robert Graham*, the husband, died without issue the 17th of *December*, 1749, having by his will, bearing date the 17th of *September*, 1747, devised to the defendant, *Mrs. Wayne*, his niece and heir at law, all his real estates for life; remainder to her first and other sons in tail, with remainders over. In 1752, the defendants, *Wayne* and his wife, filed a bill for an account and application of the real and personal estates of *Robert Graham*, to which the plaintiff put in her answer, insisting upon her jointure; but did not, either by her answer, or at the hearing, pretend that the estates were deficient. In 1754, a decree was pronounced, and an account directed, and the surplus rents of the real estates were directed to be paid to *Wayne* and his wife. In 1758, when the Master was about to make his report, the plaintiff set up a claim arising from a deficiency in the settled estates; but there being no directions relative to it in the decree, the Master disallowed the claim, and the plaintiff took exceptions to the report, which were overruled without prejudice to any claim she might have on account of the deficiency.

This was a bill brought against the personal representatives of her husband, and the devisees of his real estates, to have her jointure made good for the future, and an account of the arrears, &c.

The *Attorney-General*, and *Mr. Sewell* for the plaintiff.

Two questions arise in the present case: first, what the plaintiff is entitled to by way of jointure. The second question is upon the fact of deficiency. As to the first point, she is entitled by the articles to lands of the yearly value of £400 "clear of taxes and reprises;" and though the power did not extend beyond a settlement of £400 *per annum*, not clear of taxes and reprises, yet his covenant will affect the real assets of the husband, and ought to be made good out of the reversionary interest, which, by the death of himself and his brothers without issue, is come into possession, and has passed by his will. The plaintiff was married at the time of the making the settlement, and *sub potestate viri*; it cannot, therefore, prevail against the articles. Besides, the settlement is recited to be made in pursuance of the articles, a circumstance which in *West v. Errissey*, 2 P. W. 349. was alone of great weight in inducing the *House of Lords* to rectify the settlement, though it was made before marriage. As to the second point, it has been repeatedly settled that the value of the estates ought to be taken at the death of the husband, and not at the time of the settlement.

Mr. *Willes* and Mr. *de Grey*; Mr. *Ambler* and Mr. *Jones*, for different defendants.

Though the power is not recited in the articles, yet there can be no doubt but that they were intended to be an execution of it: every part of the articles imports that the father's will which contained it, was seen on that occasion. The lands are specified by name, as in the will, which are covenanted to be settled. The limitations in the articles are the same as in the will: there is no provision for daughters in either. If it had been a covenant to settle lands generally, the real assets would have been affected; but it is to settle particular lands, and the same lands as he is empowered to settle by his father's will; the

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reversionary interest, therefore, which fell in afterwards, ought not to be liable to make good her jointure beyond the extent of the power. As to the insertion of the words "clear of taxes and reprises," it was evidently a mistake. The settlement, therefore, in varying from the articles ought not to be considered as proceeding on a new agreement, but as rectifying the mistake: it was therefore consistent with the true construction of the articles, and in that light to be considered as made in pursuance of them. But on the foot of a new agreement the settlement ought to prevail, as she was in many respects *sui juris*.

*The Lord CHANCELLOR.*

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I will first give my opinion, and then my reasons for it. And I am of opinion, that on the true construction of the will of *Robert Graham*, the father, the articles, and the marriage settlement, *Lady Londonderry* is entitled to £400 *per annum* jointure, *public taxes being deducted* in proportion to the lands comprised in the will of the father.

I think that the articles were entered into in execution of the power, they were made with a privity of the father's will, and the limitations contained in them are penned pursuant to the limitations in the will. It is, therefore, clear to me, that the insertion of the words "clear of taxes and reprises" was a mistake in the persons who drew the articles; they imagined, probably, that the words of the power were to be so understood. Powers of this sort do not in general free the jointure from public taxes (*a*); but this was not understood at the time.

(*a*) See the doctrine on *Duchess of Marlborough*, 2 this point in the case of the *Atk.* 542. and the cases cited *Marchioness of Blandford v.* in *Mr. Saunders's* note.

As to the settlement, Lady Londonderry is to be considered in this court as a *feme sole*: she contracted for her separate use, and was capable of so contracting notwithstanding her coverture. The settlement in every part of it imports an intention to settle a jointure according to the extent of the power; the covenant most strongly marks that intention, and the lands and pension settled are expressly said to be £400 *per annum*.

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The second question is, as to the fact of the deficiency, upon which I must direct an inquiry. I think that where there is a settlement of this nature, the value cannot be fixed with justice but at the death of the husband: the wife cannot know the value but by inspection of the leases, or by information, if the estates are in land. The rent taken at a particular time, and at a particular letting, ought not to bind the wife. The rent of an estate is very uncertain, it often varies: the landlord is often obliged to give boons. Where he has been at an expense of improving, it is common for the tenant instead of paying a sum of money for the improvements, to pay an increase of rent.

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41 Ch. D. 286.

WYCHERLEY v. WYCHERLEY.

*Et à contra.*

(*Reg. Lib. B. 1762. fol. 189.*)

4th, 7th, & 18th  
Feb. 1763.  
S. C.  
Aston, MSS.  
Sewell, MSS.

DANIEL WYCHERLEY being seised of lands in the county of Salop, by indentures of lease and release, bearing date the 10th day of June 1762, did give, sell, alien, and convey unto his daughter, the Countess of Londonderry, the lands therein expressed, together with the right and privilege of common and pasture therein expressed, unto her, her heirs, assigns, and assigns forever, unto her, her heirs, assigns, and assigns forever, the peace of families; and therefore, where a son upon his marriage joined with his father in re-settling the estate, and by a memorandum executed at the same time, agreed to secure 500*l.* to each of his sisters: held, that there was sufficient consideration for the court to decree a specific performance of this agreement, an attempt to shew that it had been obtained by an undue exercise of parental influence having failed.

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ing date the 9th and 10th of *September*, 1696, conveyed to trustees, to the use of himself for life, remainder to his sons in strict settlement; remainder to *Thomas Wycherley*, of *Latham*, for life; remainder to trustees, to preserve, &c.; remainder to his first and other sons in tail male; remainder to his own right heirs.

In the year 1757, the premises became vested, under the above settlement, in *Thomas Wycherley*, the grandson of the above-named *Thomas Wycherley*, of *Latham*. It appeared that he had been before that time living in great indigence and obscurity. His family consisted of *Daniel*, the defendant, and two daughters, the plaintiffs in the former of the present suits. *Daniel Wycherley*, the son, being desirous to make a settlement upon his approaching marriage, an arrangement was proposed with his father to re-settle the estate. His father at first wished that he would settle part of the premises upon his mother, and make a provision for his sisters. The son, however, refused the former proposal, but acquiescing in the latter, an agreement was entered into, that in case *Thomas*, the father, would suffer a recovery, and declare the uses to himself for life; remainder to the defendant *Daniel* in fee, he, the said defendant *Daniel*, would secure £500 each to the plaintiffs, his sisters, payable within six months after the decease of the said *Thomas Wycherley*. The recovery was accordingly suffered to the above uses in *Trinity Term*, 1757.

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By a memorandum, bearing date the 13th of *July*, 1758, the defendant, *Daniel Wycherley*, in consideration of natural love and affection to his sisters, agreed within one month from the date thereof, to execute a deed to secure £500 each to his sisters, payable within six months after the death of his father.

The bill in the first cause, which was brought by the sisters, prayed a specific performance of the agreement

contained in the memorandum, and that the estate might be charged with £500 each for their benefit. The cross bill was filed by the son, and prayed that the memorandum might be cancelled, as having been obtained under undue influence, and parental authority, and as being voluntary and without consideration. It appeared that *Henshaw*, the father-in-law of the defendant, had, previous to his marriage, insisted upon a settlement, and upon an immediate provision to be allowed by *Wycherley*, the father; that the father was unable to make any such allowance, and that *Henshaw*, in consequence, strongly urged the son not to enter into any agreement to re-settle the premises. The son, however, afterwards executed the agreement, and though evidence was entered into of strong language used by the father, yet no case of improper exertion of authority was made out by the evidence.

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Mr. *Sewell* and Mr. *Perryn* for the plaintiffs.

The *Attorney-General*, Mr. *de Grey*, and Mr. *Comyn*, for the defendant, contended, that the agreement was merely voluntary, and therefore the court would not lend its aid towards carrying it into execution; that it was obtained unfairly, and by undue exercise of parental power, which the court always looks upon with a jealous eye. They cited Mr. Auditor *Benson's* case, before Lord *Hardwicke*, where Mr. *Benson* had prevailed upon an only son, by a former marriage, to suffer a recovery, and make a settlement in favour of the children of a second marriage, the court set it aside, and in the decree declared they did it because the deeds were obtained by undue exercise of parental authority. *Carpenter v. Heriot (a)*.

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The Lord CHANCELLOR.

Upon the best consideration I have been able to give

(a) *Ante*, Vol. I. 338.

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this matter, I think I ought to dismiss the cross bill, and to pronounce a proper decree for a specific performance of the agreement, signed by Mr. *Wycherley*.

The questions made by his counsel are two. 1st. They object want of consideration. 2dly. They make what would have been a still stronger objection if substantiated in proof, viz. that the agreement was obtained by undue means, and under an improper exertion of paternal influence. And if either of these objections had been made out in evidence, I should not have decreed as I am going to do as the case stands.

Court in general  
will not decree  
performance of  
voluntary agree-  
ments.

I do not lay it down as a universal rule, that the court will in no case execute a voluntary conveyance, though I do not recollect a precedent of that sort. It is certain that, in general, courts will not compel the performance of voluntary agreements. An agreement, in its nature, imports a reciprocity, and a *quid pro quo*, and where that reciprocity does not exist, the power of enforcing it does not exist. (I do not mean cases of specialties, where the deed itself is evidence of a consideration.) I say, I know no instance where a court of equity has compelled a man to execute what was a mere act of volition (*a*).

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(*a*) According to a distinction since established, if the subject in question rests in *covehant* and is purely voluntary, the court will not execute that voluntary covenant; but if the *legal conveyance* has been made, the equitable interest will be enforced. If you want the assistance of the court to constitute you *cestuy que trust*, and the instrument is voluntary, you shall not have it: but if the legal conveyance be made, that constitutes the relation between trustee and *cestuy que trust*, though voluntary, and the court will execute it against the trustee and author of the trust. *Coleman v. Savel*, 3 Bro. C. C. 12. 1 Ves. jun. 50. *Ellison v. Ellison*, 6 Ves. 661. *Pulvertoft v. Pulvertoft*, 18 Ves. 99., vide also *Griffin v. Nanson*, 4 Ves. 344. *Lee v.*

But I think the present was not a mere voluntary agreement, and the court will (and I am warranted by the precedents to say, that it has done so) attend to slight considerations for confirming family settlement and modifications of property. They pay a regard to reasonable motives, and honourable intentions. In these cases they will not weigh the value of the consideration. They consider the ease and comfort and security of families as a sufficient consideration. In the case of collateral limitations, purchased by a father on the marriage of his son, by relinquishment of part of his estate, this court will make the father a purchaser of such collateral limitations.

Consider the state of the family when the agreement was made. By a settlement in 1696, the father was tenant for life; remainder to his first and other sons; reversion in fee to the right heirs of the settler. The jointress dying in 1757, the remainder then vested as a fruitful remainder to the father, then an old man, and probably before both obscure and indigent. It was very material for him, and it was his duty to make all the use he could of the estate, to make a provision for his daughters. The son was at that time paying his addresses to a young lady who had no fortune till a settlement was made: that was a proper opportunity for the father to come to terms with his son, as the son, without the father's concurrence, could not have made a jointure, or any provision for younger children. The father, therefore, proposed, if the son would make a settlement on the daughters, that he would join with him in opening the estate, and upon this a treaty was entered into; and what was done then is conclusive upon the point of parental influence, because the son absolutely refused to do any thing

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*Henley*, 1 *Vern.* 37, and note of collaterals, *vide Hale v. Lamb*, *post.* 292.  
to it. As to the effect of limitations in a settlement in favor



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to let in his mother. The witnesses say he negatived this absolutely, but as to his sisters, he was very ready to make a provision for them. He thought it very proper; he had no objection. These, or the like expressions, are used by some or one of the witnesses. And, in truth, it would have been very unnatural, and a want of piety to his father, and affection to his sisters, if he had refused in joining to make a provision for the sisters out of the estate. His objection was to the projected provision for his mother, and not to that for his sisters.

The family he was going to marry into wanted, indeed, a reasonable provision to be made for the immediate sustenance of himself and his family, and this was very prudent: and there was nothing improper in their endeavouring to do it. The father, however, thought that he could not afford it, and it was in consequence refused. The son thereupon rejects the advice given him by his intended father-in-law, Mr. *Henshaw*, and executes this writing seven days before the execution of the deeds, making a tenant to the præcipe: one of the witnesses proves the manner in which it was executed. Soon afterwards the son tells Mr. *Henshaw* he would not blame him if he knew his motives. These motives are not well explained to him. I consider the motive was, the father joining with him in suffering the recovery. When the deed was brought to Mr. *Henshaw* he never objected to the general import, but only to its form. He did not say it was a voluntary and improper agreement, but found fault with the word *grant*, as containing a warranty: the son himself did not object to any other part.

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The whole family took it as a charge; what else could be the reason of leaving part of the estate unsettled, when the son, besides that, had a power to raise a limited sum for payment of his debts?

I shall always hold the opinion I did in the case of Colonel *Carpenter* (a), because I took it from the *dicta* of the greatest judges that ever sat in this court, from Lord *Nottingham* down to the present time, that wherever a father purchases an office, or any thing else for his son, it shall always be considered as an advancement, and not as a loan. To make any other construction would be repugnant to every principle of law, for if I could charge my son with his schooling, his education at the university, and the expenses of travelling, &c. it would be to say the son might contract debts with his father at a time when he could contract with no other person. In cases, therefore, where a father unduly compels a child by paternal influence, the court ought to be strictly rigid in guarding against it. But here I see nothing which the father might not properly do (though more properly, to be sure, if he had done it with less warmth of temper), for what reason could there be for the father to come in and give the son a marketable interest, and the son do nothing for himself or the family? It was said, nothing was intended but to vest the remainder in fee in this family. I thought in the opening, that such had been the case; if so, and the remainder in fee had been limited to the father, I should have thought it a case of parental influence. But here the father has only an estate for life, with remainder in fee to the son.

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In family agreements, the court has administered an equity which is not usually applied to agreements, even where some degree of au-

thority has been exercised by a parent, or where the party might have been under a misapprehension of his rights. *Cann v. Cann*, 1 P. W. 723.

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(a) *Carpenter v. Heriot*, ante, Vol. I. 338.

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- Stapilton v. Stapilton*, 1 *Atk.* 2. *Cory v. Cory*, 1 *Ves.* 19. *Pullen v. Ready*, 2 *Atk.* 587. *Kinchant v. Kinchant*, 1 *Bro. C. C.* 369. *Stockley v. Stockley*, 1 *V. & B.* 23. *Dunnage v. White*, 1 *Swa.* 137. *Gordon v. Gordon*, 3 *Swa.* 400. *Tweddell v. Tweddell*, 1 *Turn.* 1. *Newman v. Rogers*, *ib.* 14. n.
- 

31st March,  
 1763.  
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*Sewell*, MSS.

Master being turned out of possession upon the vessel's being captured, does not deprive him of his lien for the freight in case of her recapture.

*Ex parte* CHEESMAN in the Matter of WELFITT (a).

THE question upon this petition arose upon a claim by the master of a vessel to his lien upon the freight. The ship had been captured, and he, with several of the crew, sent into the enemy's port. The ship was afterwards recaptured.

*The Lord* CHANCELLOR.

The master's right is founded on the principle of the specific lien of innkeeper, tailor, carrier, &c. extended by courts of equity to all cases of possession. He has a specific lien upon the ship and cargo. His being taken, and by that means out of possession, can make no difference. The owner received the ship on her arrival, after the recapture, *loco magistri*, and as trustee for the master. If he had voluntarily quitted possession of the ship, that would, indeed, have made a difference.

(a) There is no note of this petition in the Book of the Secretary of Bankrupts. 12 *Mod.* 447. & 511. *Ar-taza v. Smallpiece*, 1 *Esp.* Rep. 23. *Ward v. Felton*, 1 *East*, 507. *Soldergreen v. Flight*, cit. in *Hanson v. Meyer*, 6 *East*, 622.

1892. 2 R. 3. 364.

PIKE v. HOARE.

(Reg. Lib. B. 1762. fol. 217.)

25th April,  
1763.  
S. C.  
Amb. 428.

THIS was a bill by the plaintiff, as heir at law of his brother, to have an issue directed to try the validity of his brother's will. It was admitted that his whole real estate lay in *Pennsylvania*. The will was dated the 18th of October, 1752, and subjected the real estate to the payment of debts and legacies.

Bill by an heir at law, for an issue to try the validity of a will made in *England*, dismissed, partly on the ground of his acquiescence, both in the ecclesiastical court, and upon a bill to perpetuate testimony, but principally because the lands lay in *Pennsylvania*.

The testator died in 1755, and since his death the devisees had filed a bill in *Chancery* against the plaintiff, the heir at law, to perpetuate the testimony of the witnesses. The plaintiff put in an answer, and had applied for and had been paid his costs of that suit. The plaintiff had at first disputed probate of the will in the ecclesiastical court, but afterwards withdrew his caveat; and it appeared that since the will had been proved, the executors and devisees had paid away upwards of £5000 in debts and legacies.

Mr. Serjt. *Hewitt* and Mr. *de Grey* for the plaintiff.

This is a proper and even a necessary jurisdiction to be exercised. The will is deposited in the archbishop's court, which will not part with it to be carried to *Pennsylvania*. The testator lived some time before his death, and made his will in *England*; had been a long time ill, and his state of mind, and the circumstances attending the will, must be proved by persons who lived in *England*. The witnesses to be examined are very numerous, and it will be very difficult and expensive, if practicable, to get them to *Pennsylvania*. There is no compulsory method of doing it, and many of the witnesses are in pro-

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fessions and business which they cannot leave, as the physician, apothecary, and others. The parties will have a trial by a jury in *England*, which they otherwise cannot have.

Mr. *Sewell*, Mr. *Wedderburne*, and Sir *Anthony Abdy*, for the defendant.

This court has no jurisdiction ; the parties may have justice according to the laws of the country where the estate lies. However, if the court has jurisdiction, it is discretionary to direct an issue ; and in this case the circumstances of acquiescence in the plaintiff, by which the devisees have been drawn in to pay large sums of money out of the effects, do not entitle him to any favour.

*The Lord Chancellor.*

The granting the relief prayed by directing an issue, is discretionary in the court. The general ground of this sort of bill is, to remove terms, or other impediments out of the way, and it is discretionary in those cases, either to direct an issue, or to prevent terms being set up so as to give an opportunity for the plaintiff to bring an action.

In the present case, if it concerned lands in *England*, I should refuse to interpose, for the plaintiff saw the will, at first opposed the probate, afterwards withdrew his opposition. The administration under the will affects the real estate, which is made subject to debts and legacies. The plaintiff stands by, and suffers the executors and devisees to pay away large sums of money under the will. Upon a bill to perpetuate testimony, he did not cross-examine the witnesses, but took his costs as a disinherited heir. He has forfeited his right to come here, for want of purity in his behaviour and conduct.

This would have been my opinion if the estate had been in *England*. But I build my opinion materially on

the fact of the lands lying in *Pennsylvania*, for a will of lands lying in any of the colonies is not triable in *Westminster Hall*; if it were, it would be introductive of great confusion, and be very detrimental to the colonies. We have colonies and factories in the four quarters of the world, and each colony and factory have distinct laws of their own. Judges in *Westminster Hall* are not acquainted with the laws of the several colonies and factories; they are local. In *Penn v. Lord Baltimore* (a), Lord *Hardwicke* made the distinction, and said, it was the contract that gave the court jurisdiction in that case; the principles of equity being the same in all places. What weighs strongly with me, is, that no issue was ever directed to try will of lands in *Ireland*. It was attempted in Lord *Robert Manners's* case (b), but given up, and that was as strong a case as this. Mr. *Calwell*, the testator, lived and died in *England*; never was but once in *Ireland* to see his estate, and his will was made in *London*.

As to inconveniences, if the law is clear, they afford no argument of weight with the judge. The legislature only can remedy them. They are properly considered only in a case where the court entertains doubts; which I do not upon the present occasion. But the inconveniences on the other side would, in my opinion, be much greater, if the whole property in the colonies were to be

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A will of lands lying in the colonies is not triable in *Westminster Hall*.

(a) 1 *Ves.* 444. His lordship's words there are, "this court has no original jurisdiction on the direct question of the original right of the boundaries, and this bill does not stand in need of that. It is founded on articles executed in *England*, under seal, for

mutual consideration; which gives jurisdiction to the king's courts, both of law and equity, *whatever be the subject-matter.*"

(b) The Editor has not been able to meet with any report or note of this case.

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determined in the courts of *England*. I take it that every will proved here in the spiritual court, may be proved in the colonies as the original act of the parties. Why did not the testator execute a duplicate? The supineness of an individual cannot alter the law. If the testator has by his mismanagement brought these difficulties upon his family and estate, it is not in my power to help it. I must therefore dismiss the bill.

Courts of law have no jurisdiction in local actions respecting lands lying in *Ireland*, the *Isle of Man*, the colonies, &c. nor can courts of equity affect them. Countess of *Derby's* case, *Keilw.* 202, affirmed 4 *Inst.* 283. *Cartwright v. Pettus*, 2 Ch. Ca. 214. Sir *William Pettit's* case, cit. 1 *Vern.* 421. *Skinner's* case, cit. arg. *Fabrigas v. Mostyn*, 20 *How. St. Tr.* 215. But a court of equity can act upon the person of one residing here, and therefore, with regard to any contract made concerning such lands, or any equity arising between persons in this country respecting them, the court will hold the same jurisdiction as if they were situated in *England*, and imprison the party disobeying its orders. *Archer v. Prestan*, 1 Eq. Ab. 133. *Earl of Ar-*

*glasse v. Muschamp*, 1 *Vern.* 75. *Lord Kildare v. Eustace*, *ib.* 419. *Toller v. Carteret*, 2 *Vern.* 494, 1 *Salk.* 404. *Penn v. Lord Baltimore*, cit. ante. *Earl of Derby v. Duke of Athol*, 1 *Ves.* 202. *Roberdeau v. Rous*, 1 *Ath.* 543. *Foster v. Vassal*, 3 *Ath.* 587. *Lord Cranstown v. Johnston*, 3 *Ves.* 170. *White v. Hall*, 12 *Ves.* 321.

The determination, therefore, that a court of equity will not direct an issue to try the validity of a will of lands abroad, seems open to considerable objection. The object of sending an issue to a jury, is, to direct the conscience of the court when deciding upon matters of fact; its right to which, it may be observed, has always been recommended to be very tenderly and sparingly exercised. *Warden and Minor Canons of*

*St. Paul's v. Morris*, 9 Ves. 168. As the court, therefore, as has been shewn, assumes to itself the jurisdiction of deciding upon equities arising out of lands abroad, where it can act *in personam*, it seems proper that it should have the power consequential and auxiliary to that jurisdiction, of directing issues in those cases, where, in deciding upon such equities, it may be proper for it to have its conscience directed by the verdict of a jury upon the *facts* out of which such equities arise. The contrary opinion appears to have originated from confounding the nature of an issue, which is merely a process auxiliary to a court acting *in personam*, and deciding upon an equity over which it has a clear jurisdiction, with *local actions*, which obviously cannot be maintained for lands abroad, or with the interposition of a court of equity acting *in rem* by partition, sequestration, &c.

It is observable, however, that Mr. *Yorke*, in his opinion upon Lord *Clive's* jaghire, 1 Collect. Jurid. 246, takes a distinction between the jurisdiction of the court for an account of rent issuing out of land, and cases of title, where the court decrees possession or title-deeds to be delivered up, or perpetual injunction to quiet possession; or where it directs *issues of fact to be tried by juries* at common law, upon boundaries, or upon the validity of deeds or wills, in respect of the execution of them, or their validity as instruments. In cases of this latter kind, the court, both by its interlocutory and final decrees, in some sort gives relief upon the merits of the strict title to the thing itself.

See upon the general doctrine the opinions of the other eminent persons who were also consulted upon the subject, *ib.* 249, *et seq.*

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2d &amp; 3d May,

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Amb. 430.

## UNETT v. WILKES.

*Et à contra.*

(Reg. Lib. B. 1762. fol. 279.)

Testator, possessed of freehold and copyhold not surrendered, of which latter his mansion-house was part, after certain legacies, devises all his real and personal estate to his wife for life; remainder to his heir at law: held, from an expression in his will, *if she should think proper to reside at his said mansion-house*, that the testator intended to devise his copyhold, and that the heir therefore ought to be put to his election.

DR. WILKES, by will, 22d February, 1759, after giving several legacies to his servants, devised to the Reverend William Astley and Ruper Dovey, and their heirs, all his real and personal estate, of whatsoever kind and denomination, in trust, to receive the rents, profits, and interest on the same, and pay the produce from time to time to his wife, Mrs. Frances Wilkes, or else that they permit and suffer her to receive and give discharges for the same during her life, and in case she should think proper to continue and dwell at *Willenhall*, at the house he then inhabited, that then they permit and suffer her for the term aforesaid, to make use of all his household goods, plate, books, implements of husbandry, and stock of all kinds, as cows, horses, pigs, hay, corn, clover, and such like things, whether specified by name or not. But in case she should not think proper to continue there, that then they should deliver to his said wife his chaise, and the horses belonging to it, and such horse and horses as she should choose, and what plate, bedding, or linen, she should have occasion for, in furnishing some other house in a manner agreeable to her; and that they should permit and suffer her to enjoy and use all such things as long as she lived, and that all the rest of his goods should be by them converted into money, and placed out at interest, which interest they should receive and pay her from time to time as it became due, or they should per-

mit her to receive the same as long as she should live. And after giving several pecuniary legacies to be paid after her death, he directs the trustees to convey, transfer, give, or deliver to the plaintiff, the Reverend Mr. *Thomas Unett* (his heir at law), all his real estate, and all the rest and residue of his personal estate, and settle it on him and his heirs for ever.

The testator, at the time of making his will, and at his death, was seized of a freehold estate of inheritance of about £140 a-year, and of a copyhold estate of about £200 a-year, but did not surrender the copyhold estate to the use of the will. His mansion-house at *Willenhall* was copyhold.

After his death, the plaintiff, *Unett*, claimed the copyhold as heir at law, for want of a surrender, and also claimed the freehold and personal estate in remainder, under the devise in the will, and brought his bill for an account of his personal estate against the widow, who had taken and obtained administration to her husband, and to have the trusts of the will performed: offering to confirm her life estate in the freehold property.

The cross bill was brought by the widow to compel *Unett* to make his election, either to take under the will, or as heir at law; and in case he should elect to take as heir, to have a compensation out of the personal estate and effects of the testator, equal to the interest in the copyhold, which the testator intended to give her by his will (a).

(a) In *Green v. Green*, 2 *Meriv.* 86, Lord *Eldon* considered it a question of great difficulty, whether, a party electing to take one of two beneficial interests, was bound only to make compensation to those who are disappointed by the election, or to surrender entirely the other part of the title under which he claims. In *Tibbits v. Tibbits*, 1 *Jacob*, 319, he seemed to think the old principle of the court

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The *Attorney-General* and Mr. *Sewell* for the plaintiff; Mr. *Ambler* and Mr. *Madocks* for the defendant.

*The Lord CHANCELLOR.*

I am clearly of opinion, that this case is within the determination of election, and that the plaintiff *Unett* must make his election.

The testator's intention was manifest to devise his copyhold estate to his wife for her life, by the general words *all his real estate* (a). I do not, however, depend upon the construction to be put upon those general words when standing by themselves; but the subsequent words, "in case she should continue to live at *Willenhall*," &c. put it out of doubt, for his house at *Willenhall* is copyhold, and that part of the will supposes he had before given her the house for her life, which could only be by the general words, and if they would pass his mansion-house as copyhold, they would all his other copyhold estate. The plaintiff, by claiming the copyhold, would disappoint the testator's intention, and therefore must make his election.

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His lordship also held, that he had determined his election to take under the will by an agreement he had entered into with the widow, about buying her interest in the personal estate; but this last question was not argued, or spoke to by the plaintiff's counsel, but taken up by

was *compensation*, till shaken by later determination. See the doctrine fully discussed in Mr. *Swanston's* note to *Gretton v. Haward*, 1 *Swa.* 433.

(a) See Sir T. *Plumer's* observations in *Sampson v. Sampson*, 2 *V. & B.* 337.

the court on my mentioning it as counsel for the defendant (*Amb.*).

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The decree declared, that his lordship was of opinion, that the plaintiff, *Thomas Unett*, must take altogether under the will of the said testator, or not any legacy or devise thereby made or given to him; and is of opinion that the said testator intended by his said will to pass his copyhold estates to trustees for the benefit of his widow for life, with remainder to the plaintiff *Unett* in fee; that the plaintiff *Unett* do surrender the copyhold estate to the use of the said defendant for life, with remainder in fee, accounts, &c.

See the case of *Judd v.* to the general doctrine upon *Pratt*, 13 *Ves.* 168, which election, *vide Forrester v.* was likewise a question of *Cotton, ante*, Vol. I. 532, and election upon copyholds. As note to it.

MORRIS v. MAC CULLOCK.

13th May, 1763.  
S. C.  
*Amb.* 432.

(*Reg. Lib. B. 1762. fol. 315.*)

THIS was a bill brought to be repaid the sum of £200 which the plaintiff had paid to the defendant for procuring him a commission of lieutenantancy in the marines. The marines, decreed to be refunded with interest, plaintiff having, after six months, been discovered to have worn a livery, and being thereupon discharged: first upon grounds of public policy, and secondly, as plaintiff had been imposed upon, defendant knowing that he was incapable of holding the commission.

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defendant was a linen-draper, and entered into treaty with the plaintiff, who was a livery servant to Captain *Bendish*, to procure him a commission in the marines for £200; the plaintiff not having the money, applied to his master to lend him £200 to pay for the commission, which he refused, and gave as a reason, that it would be very improper for him to be instrumental in getting the plaintiff, who was a servant, into the marines as an officer; and that all the officers of the corps would be offended at it. Captain *Bendish*, who was examined as a witness in the cause, deposed, that the defendant was in the passage of his house when he gave his reason to the plaintiff for refusing to lend him the money, and that he left the parlour door ajar on purpose that the defendant might hear the reason; and stated it to have been his positive belief that the defendant did hear it.

The treaty, however, went on, and the plaintiff having obtained the money from some other quarter, agreed for the commission; and accordingly the defendant, being acquainted with Mrs. *Stot*, who was, or pretended to be, the wife of a captain *Stot*, and was intimately acquainted with the late Admiral *Boscawen*, did, by her means and interest with the admiral (who was then one of the Lords of the Admiralty), obtain a commission of second lieutenant for the plaintiff, who paid him for it £200, of which the defendant paid Mrs. *Stot* £50 for her service. Mrs. *Stot* swore that the commission was first obtained for the defendant, but that his wife being unwilling he should take it, he prevailed on her to recommend the plaintiff.

The plaintiff went to *Portsmouth* with his commission, and after having served about six months, was discovered to have been a livery servant; upon which the officers refused to roll with him, and sent a letter upon the subject to the secretary of the Admiralty, which was laid before

the Lords of the Admiralty, and the secretary, by their direction, wrote a letter in answer, commending them, and ordered the plaintiff to be discharged. And it appeared in evidence that the plaintiff was discharged in consequence of that letter, and for having been a livery servant, and for no other reason.

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The *Attorney-General*, Mr. *Sayer*, and Mr. *Bicknell*, [ 192 ] for the plaintiff, contended, first, that he had been imposed upon by the defendant, and had not the benefit of the commission for which he had contracted, the defendant knowing the plaintiff could not hold it. Secondly, that the court would decree the money to be repaid upon public considerations, for the same reason that the court decrees against place brocage bonds. *Law v. Law*, 3 P. W. 391. and *For*. 140.

Mr. *Sewell*, Mr. *de Grey*, and Mr. *Jones*, for the defendant.

The plaintiff was not imposed upon; he had what he bargained for, which was the commission; the defendant did not warrant his qualification. It is like the case of *Ive v. Ash*, Prec. Can. 99. The plaintiff could have no merit in a court of equity, for if the transaction, was wrong, and such as ought to be discouraged, he was a party to it.

It appears, by Mrs. *Stot*'s evidence, that the commission was first obtained for the defendant; and the defendant, therefore, was not selling his interest so much as selling his commission, which is not uncommon, and the crown often gives leave to do it. There was nothing illegal in such a transaction, and no imposition on the plaintiff. The plaintiff's remedy, if he is entitled to it, is at law, in an action for money had and received, when the whole transaction would be disclosed to a jury, and they would give proper damages. Nothing stands in the way of such an action, and therefore this is not like the

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case of place or marriage brocage bonds, where the bonds are good at law, and can only be set aside in a court of equity.

*The Lord CHANCELLOR.*

I have not the least doubt on this case ; and if there is no precedent of such a determination as I shall make, I have no scruples to make one, and shall glory in doing it.

The general question is, whether this case is within the jurisdiction of the court ? I lay down this rule, that if a man sells his interest to procure a person an office of trust or service under the government, it is a contract of turpitude : it is acting against the constitution, by which the government ought to be served by fit and able persons, recommended by the proper officers of the crown for their abilities, and with purity. This case is within the reason of the determinations upon marriage brocage and post-obit bonds. It is one of the most useful jurisdictions of the court, and ought to be exercised upon all occasions.

By this means the most innocent and pure officer of the crown, whose business it is to recommend, may have his honour traduced and scandalized. It is no uncommon thing to sell commissions in the army, but then it is done with the leave of the crown, as a method to reward merit with economy, where an officer, who has deserved well, desires to retire, and the person to succeed him is examined by the secretary at war, and approved as a proper person : that was not the case here, but the defendant sells his interest with Mrs. *Stot* to procure a commission. The case of *Ive v. Ash* is very different : the commission was sold by leave of the crown, the defendant surrendered, and it was the plaintiff's fault that he did not take it.

I am also of opinion, that if the defendant might sell

his interest, yet the plaintiff has been imposed upon. I do not believe the defendant ever intended to take the commission himself; his name was not entered on the list, nor is it in other respects at all probable; and he knew that the plaintiff was incapable of it, by having worn a livery.

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In cases of relief, upon grounds of public policy, the objection that a party does not deserve the relief, as being *particeps criminis*, never prevails. *Neville v. Wilkinson*, 1 Bro. C. C. 548. *Hartwell v. Hartwell*, 4 Ves. 811. *Hatch v. Hatch*, 9 Ves. 298. *Shirley v. Martin*, cit. *ib. nom. Shirley v. Ferrers*, and 3 P. W. 75 n. and more fully in *Roche v. O'Brien*, 1 Ba. and Be. 358. *Eastabrook v. Scott*, 3 Ves. 456. The public interest requires that the relief should be given; and it is given to the public through that party. *Thompson v. Thompson*, 7 Ves. 470. Lord *St. John v. Lady St. John*, 11 Ves. 536. *Osborne v. Williams*, 18 Ves. 379. Vide *Nash v. Ash*, ante, Vol. I. 378.

HUSSEY v. BERKELEY.

(Reg. Lib. A. 1762. fol. 530.)

6th June, 1763.  
S. C.  
Amb. 603.  
Serjt. Hill, MSS.  
Coxe, MSS.

THE Countess Dowager of *Tyrconnel*, by her will, bearing date the 26th of May, 1726, after giving legacies to two of her grandchildren, Lady *Netterville* and Mrs.

Description of legatee, which it was doubtful whether it applied to mother or daughter, held

from the construction to mean the former: extrinsic evidence admitted, but held to amount to nothing.

Opinion given that the word *grandchildren* in a will, comprehends *great grandchildren*, unless the intention appears to the contrary; in the present case it was so held, on the ground of the testatrix having in another part of the will described a great grand-daughter as a grand-daughter.

Widow of a grandson held not to be comprehended under the description of a grand-daughter.



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*Hussey*, of £100 each to buy rings, appointed *William*, Lord *Berkeley*, her executor; desiring him to pay and dispose of the residue of her personal estate, after paying her debts and legacies to such person and persons, and to such use and uses, and in such manner, as she should, by any letter or writing under her hand, direct and appoint.

By a codicil in the nature of a letter, of the same date as her will, she gave legacies to several of her great-grandchildren, and also to Lady *Dillon*, who was the daughter of her grandson, Lord *Dillon*: she directed that the £100 given to Lady *Netterville* and Mrs. *Hussey* should be paid out of her effects in *Ireland*. She gave to Miss *Hussey* her Indian screen, together with all her china in *London*; in another part of the codicil she gave the china in a small Indian trunk, as well as the china in another chest, to her grand-daughter, Miss *Hussey*; and if her effects should prove to be more than she had already given away, she desired the residue might be divided between her grandchildren named therein.

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The countess left several grandchildren and great-grandchildren surviving her, and three questions were made. First, Whether Mrs. *Hussey*, the wife of the plaintiff, or her daughter, Miss *Hussey*, were meant by the description in the will? and it was proved that the testatrix used to call Mrs. *Hussey* by the title of Miss; and several letters from the testatrix were produced which were directed to the Honourable Miss *Hussey*, which, it was contended, both from the contents and the title of "honourable," which applied to Mrs. *Hussey* and not to her daughter, to be intended for the former. The second question was whether the great-grandchildren should take a share of the residue under the description of grandchildren? and the case of *Crooke v. Brookeing*, 2 Vern. 50, 106. was cited, which was a devise of £1500

in trust for the children of *A.*, who had one child and several grandchildren; and it was held that the latter should not take. The third question was, whether Lady *Dillon*, who was only a grandchild by marriage, should take under that description?

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The *Attorney-General*, Mr. *de Grey*, and Mr. *Cox*, for the plaintiff; Mr. *Sewell* and Mr. *Wedderburne*, Mr. *Willes* and Mr. *Ambler*, Mr. *Perrot* and Mr. *Madocks*, Mr. *Hoskins* and Mr. *Lucas*, for the different defendants.

*The Lord Chancellor.*

As to the first question: I am of opinion that the testatrix meant the great grand-daughter by the description of Miss *Hussey*; she has made use of the expression Mrs. *Hussey* in the codicil, which shews she meant distinct persons: the letters determine nothing.

As to the second question: I admit the case of *Crooke v. Brookeing*. The word *children* meant those in the degree of relationship in the first descent (a); but as to

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(a) So Lord *Alvanley* in *Reeves v. Brymer*, 4 *Ves.* 698. remarked that *children* might mean *grandchildren* where there could be no other construction, but not otherwise: and Sir *W. Grant*, in *Radcliffe v. Buckley*, 10 *Ves.* 201. has observed, that there are two cases where the word has received this construction; "first, the case of necessity, where the will would remain inoperative unless the sense is extended: next, where the testator has clearly shewn by other words, that he does not use the word 'children' in the proper sense, but means it in a more extensive signification." Vide, also, *Davenport v. Hanbury*, 3 *Ves.* 257. (where *Wyllie v. Blackman*, *Amb.* 555. & 1 *Ves.* 194. is more correctly stated). *Horsepool v. Watson*, *ib.* 383. *Freeman v. Parsley*, *ib.* 421. *Mayott v. Mayott*, 2 *Bro. C. C.* 125. *Silcox v. Bell*, 1 *S. & S.* 301. *Shelley v. Bryer*, 1 *Jacob*, 207.

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great grandchildren, I incline to think that the word grandchildren would, without further explanation, comprehend them ; for in common parlance, which is the true way of interpreting words in a will, the word grandchildren is used rather in opposition to, and exclusive of, children than as confined to the next descent, the children of children, and must, I think, have the effect of comprehending both, unless the intention appear to the contrary ; but in the present case there is no necessity to give any opinion upon that point, as here the testatrix has, in so many words, declared, that she meant to comprehend great grandchildren under the word grandchildren ; for she has given the specific legacy of china to her granddaughter, Miss *Hussey*, who is, in fact, her great granddaughter, the daughter of her granddaughter Mrs. *Hussey* : that, I think, is decisive of the question.

As to the third : there is no colour for considering the widow of the grandson as a grandchild, she is only so by marriage : the testatrix meant such as were her grandchildren by blood.

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STANHOPE v. MANNERS.

7th & 8th June,  
1763.

(Reg. Lib. Min. Trin. 1763.)

Deed of mortgage  
at 5 per cent.

contained a proviso that as often

as the interest should be paid half yearly on the days appointed, or within three months next after each, so much should be deducted as would make the interest 3½ per cent. By a separate agreement, mortgagee covenanted not to call in the money within five years, unless the interest should be in arrear. The first half year's interest not having been tendered till *after* the three months, but the second half year's interest *before* : held, first, that mortgagee was only entitled to interest at 5 per cent. for the half year which had been tendered after the time ; and secondly that in consequence of the default, he was entitled to call in his money.

By indenture of mortgage, bearing date the 19th of  
January, 1759, Sir *William Stanhope* borrowed £10,000

of Lord *William Manners*, with interest at £5 per cent. redeemable upon payment at two days specified. The deed contained the following proviso: "That when, and so often as the interest of the said principal sum of £10,000 shall be paid half yearly on the 19th of *July*, and the 19th of *January*, or within three calendar months next after each of the said days respectively, the sum of £62 10s. shall be abated and deducted out of every half year's interest which shall be so paid; and interest after the rate of £3 15s. for every hundred of the said £10,000, so often as such interest shall be paid within the times aforesaid, shall be accepted and taken by the said Lord *William Manners*, his executors, administrators, and assigns, in lieu and satisfaction of the interest above covenanted and agreed to be paid by the said Sir *William Stanhope*, his heirs, executors, and administrators."

By a separate agreement of the same date it was agreed that Lord *William Manners* should not call for the money within five years, unless the interest should be in arrear, and in that case that he might sue for the same.

The first half year's payment (including the three months allowed) became payable on the 19th of *October*, 1759; it was not, however, tendered till the 10th of *November*. Lord *William* wrote an answer, stating the agreement and omission, and insisting upon the failure: and, after some further correspondence, on the 1st of *March*, 1760, he gave notice to be paid off the principal. On the 18th of *April*, being within the three months after the second half yearly payment became due, Sir *William* tendered half a year's interest at 5 per cent. and half a year's interest at 3½ per cent., which was refused. The present bill was filed for a specific performance of the agreement to take 3½ per cent.

The *Attorney-General*, Mr. *Thurlow*, and Mr. *Ro-*

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*binson*, for the plaintiff; *Mr. Sewell*, *Mr. de Grey*, and *Mr. Hoskins*, for the defendant.

*The Lord CHANCELLOR.*

Two questions have arisen in the course of this transaction, and they are in the order in which *Mr. Attorney-General* has stated them. First, Whether the first default of paying interest within the time stipulated defeats the agreement of abatement of interest, and annihilates the same? And secondly, Whether, in the case that has happened, *Lord William Manners* is relieved from his contract to continue the money for five years?

Though I see no unreasonable circumstances in the present transaction, yet this being the first case of a loan for a fixed unusual stipulated time, made during a period of public distress when money was dear, it behoves me to be cautious in setting a precedent upon the duration of the term, and the *quantum* of interest as it relates to such duration.

I think, however, that from the circumstances attending this case, I shall be relieved from peculiar difficulty; for I see nothing inequitable in the agreement, either in point of duration or *quantum* of interest, and the case must be determined on the true construction of their agreement.

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It has been truly said, that the authority of this court has assumed, in cases of mortgages, the old physical maxim *forma dat esse*; and that if the interest once runs at the larger rate, it shall not be abated, unless you hit the bird in the eye, and pay or tender within the precise time; that, on the other hand, if it first runs at the lower rate it shall not be raised even on a gross default (a);

(a) *Lady Holles v. Wise*, *ib.* 316. *Jory v. Cox*, *Prec. 2 Vern.* 289. *Strode v. Parker*, *Can.* 160. *Nicholls v. May-*

though, in fact, the substantial reasonable agreement between both parties is, if you are punctual to the time agreed upon, you shall pay less than if you delay, and put to me an inconvenience.

I believe all authorities sensibly founded, but I never heard, or could myself discover, the sense of this distinction.

But that is not the present case, for this is a special agreement, and words cannot be stronger to express the intent of the parties, that in every instance, when the time had been neglected, the abatement should not be accepted; in every instance where the  $3\frac{1}{2}$  was tendered in time, that it should be accepted: and this seems a fair circumstance attending an agreement of time, and the contrary opinion would be very dangerous, viz. that one default should run through the whole term. It is very different from the case of common mortgages; the mortgagor may relieve himself by transferring the mortgage. Mr. *Sewell* seemed to aim at a middle case, as if Lord *William* ought to have 5 per cent. from the time of notice; but I do not know how to reach that: it is not within the stipulation, and if a bill of foreclosure had been brought, I must, as I do in all other cases, have given time.

As to the second point, I am of opinion, upon the same construction of the agreement, that Lord *William* is at liberty to recover the money. The words are, "at any time;" and this was reasonable, for if no interest whatever was paid, though it might be running at 5 per cent.,

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*nard*, 3 Atk. 519. *Walmesley v. Higgins*, 2 Vern. 134. & *v. Booth*, *Barnard*, Ch. Rep. *Brown v. Barkham*, 1 P. W. 481. *Bonafous v. Rybot*, 652. Vide also *Seton v. Slade*, *Burr*. 1375. which cases have 7 Ves. 273. overruled *Marquis of Halifax*

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yet it was right that he should have the power of calling in his money.



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*Amb.* 612.  
*Aston*, MSS.  
*Sewell*, MSS.

## DIGBY v. CRAGGS.

(Reg. Lib. A. 1762. fol. 477.)

A prior incumbrancer not allowed to turn interest into principal by indorsement, as against a subsequent incumbrancer, of whom she had notice.

*JOHN NEWSHAM CRAGGS*, by indentures of lease and release, bearing date the 21st and 22d of *December*, 1752, mortgaged his estates at *Chadshunt*, in the county of *Warwick*, to the plaintiff, *Mrs. Digby*, for securing the sum of £14,000, with interest at 4 per cent.

Being indebted for interest upon the said mortgage, by indorsement on the said mortgage deed, he charged the premises with the further sum of £1247; he afterwards charged the premises with several annuities and incumbrances, of which *Mrs. Digby* had notice; and becoming still further indebted to her for interest on the said mortgage, by another indorsement, bearing date the 17th of *March*, 1757, he charged the premises with the further sum of £1342 14s. 11d. This was a bill for interest upon the whole sum of £16,589 14s. 11d from the 17th *March*, 1757, or for a foreclosure.

The *Attorney-General* and *Mr. de Grey* for the plaintiff; *Mr. Sewell* and *Mr. Wedderburne* for the defendant.

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The Lord CHANCELLOR.

The second point made by the court in *Mocatta v. Murgatroyd* (a) determines this case. I am of opinion that

(a) 1 P. W. 395.

the interest cannot be turned into principal by the indorsement of the 17th of *March*, 1757, as against the subsequent annuities and incumbrancers, *Mrs. Digby* having had notice of such incumbrances.

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The case of *Greenly v. Howe*, at the Rolls, 18th *February*, 1763, cannot alter my opinion. The ground his Honour proceeded upon was, that if the first mortgagee had filed a bill, his interest, after a report confirmed, would become principal; and, therefore, it was reasonable that that might be done amicably which might be got at by adverse proceedings, and especially as the costs of such adverse proceedings must have come out of the estate, and consequently would have lessened the security of the other incumbrancers. If a bill had been filed by the first mortgagee, it seems the second might have redeemed him.

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*Mr. Kenyon* had this note from *Mr. Blencowe*. (*Aston*.)

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COUNTESS GOWER v. EARL GOWER.

(*Reg. Lib. A. 1762. fol. 448.*)

14th June, 1765.  
S. C.  
Amb. 612.

*EARL GOWER*, by a clause in his will, bearing date the 22d of *December*, 1749, directed, and appointed, and thereby declared his desire, that all his plate, furniture, household goods, and all books and other furniture of his library, and all stores and implements of all sorts and kinds, and other goods and chattels whatsoever which should be in and about his dwelling-house and out-houses

By devise of all testator's goods and chattels in and about his dwelling house and out-houses at *A.* at his death: held, that running horses passed.



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at *Trentham* at his death, and all other his plate and household linen (except as therein excepted), should be preserved for, upon, and be held and enjoyed by such person or persons as should be entitled to his said estates in the counties of *Stafford* and *Salop*, by virtue of the limitations in his son's (the defendant's) marriage settlement.

Upon a bill brought by the executors to carry the trusts of the will into execution, one question was, whether the running horses at *Trentham* passed by these words?

*The Lord CHANCELLOR.*

I think that the testator's intention was, that nothing about his seat at *Trentham* should be disturbed to the prejudice of the present Earl, but that every thing both of profit and amusement should pass. I am therefore of opinion that the running horses passed by the description of goods and chattels; and therefore so much of the bill as claims an account of the testator's running horses, and other effects at *Trentham*, must be dismissed.

18th June, 1763.  
*S. C.*  
*Sewell MSS.*

TAYLOR v. CLARKE.

(*Reg. Lib. B. 1762. fol. 355.*)

Testator devises leasehold premises to his executor, after payment of certain sums to pay the rents to *A.* for life, and then that his natural daughter should have the same for her life; and in case she should die, leaving no lawful issue, he bequeathed the premises to his executors, to be sold for the purposes of the will: held, the devise over the executors not too remote.

*THOMAS BRYAN*, by his will, bearing date the 26th of April, 1748, devised (amongst other things) to his executors, their executors and administrators, all his farm and lands at *Teddington*, in the county of *Warwick*,

and then that his natural daughter should have the same for her life; and in case she should die, leaving no lawful issue, he bequeathed the premises to his executors, to be sold for the purposes of the will: held, the devise over the executors not too remote.

which he held by lease from the crown, upon trust to renew the said lease out of the rents, issues, and profits thereof; and after payment of the yearly rent reserved thereon, that they should pay the residue of the said rents, issues and profits to *Martha Clarke*, for her life; and then that his natural daughter, *Ann Bryan*, should have and possess the said farm and lands, and the lease and leases thereof, for her life: and in case she should die, leaving no lawful issue, then he bequeathed the said leasehold premises to his said executors, to be sold for the purposes of his will.

The cause coming on for further directions, one question was, whether the bequest over to his executors was void or not, as being too remote?

*Mr. Sewell*, *Mr. de Grey*, and *Mr. Keate*, for the executors; the *Attorney-General* and *Sir Anthony Abdy* for the infant, *Ann Bryan*.

*The Lord Chancellor.*

The questions in this point are, 1st, What interest *Ann Bryan* took under the first words of the bequest? and 2dly, How those words are controlled by the subsequent words?

1st. It is certain that a bequest of a chattel to one and the heirs of her body, gives her the whole absolute interest: it is the same where it is to one for life, and afterwards to the heirs of her body, as these words would constitute an estate tail in a freehold; but though it is so in legal strictness, it is very far from being so in the vulgar acceptance of testators; and, therefore, in the case of personal estate, where the court can take hold of particular words, it will put the vulgar sense upon a bequest.

I construe the first words, "to her for life, and the heirs of her body", as if it had been to her and her executors. But however absolutely a man may have given by his will, he may control that gift by subsequent words, and

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make the interest which he has given depend upon a contingency. I think I am bound by the authorities to put a construction on the words "leaving no issue", agreeing with the testator's intention, expressed by those words in their popular acceptance. *Forth v. Chapman* (a) is in point, and has never been disputed. The present case is free from one strong objection which existed in that, where there were freeholds as well as leaseholds, and yet the same words were construed differently when applied to the different sorts of property. Here the testator has shewn his intention in two places: first, by the express words of limitation for life; secondly, by the subsequent words "not leaving", &c. *Peacock v. Spooner* (b) indeed had no words of devise over; but it has always appeared to all judges as a very strong determination. I searched the Lords Journals to see whether any notice was taken of the statute of 11 H. 7. but no mention was made of it by any of the judges: possibly, therefore, subsequent judges may have found it out, in order to support the determination (c). In *Webb v. Webb* (d), Lord Harcourt was perfectly right to confine the determination of the Lords to the same specific case; but in *Webb v. Webb* there was no limitation over: it does not therefore reach this case. *Read v. Snell* (e) comes very near the present case. *Beauclerk v. Dormer* (f) was in case she shall die without issue. Upon the whole I think this contingency is such as the law will allow.

(a) 1 P. W. 663.

233. and in *Garth v. Bald-*

(b) 2 Ver. 43. 195. 2 *win, ib.* 660.

*Freem.* 124.

(d) 1 P. W. 132.

(c) Vide Lord Hardwicke's

(e) 2 Atk. 642.

observations on this case in

(f) 2 Atk. 308.

*Theobridge v. Kilburne*, 2 Ves.

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See the next case, and also *Bodens v. Lord Galway*, *post.* 297, and the note to it.

GREY v. MONTAGU.

24th & 25th Feb.  
1764.

(Reg. Lib. A. 1763. fol. 280.)

*ANN ROGERS*, by her will, bearing date the 15th of *December*, 1733, after giving several pecuniary and specific legacies, and all her real and personal estate to her only son, *John Rogers*, whom she appointed sole executor, and reciting, that by indentures of lease and release, bearing date the 11th and 12th of *October*, 1713, and made between the said *John Rogers* of the one part, and herself of the other, certain premises were conveyed to herself and her heirs, subject to a proviso or condition, to be void on payment of the annual sum therein mentioned to her, and also upon payment of the sum of £3000 to such person or persons, and at such time and place, as she, by her last will and testament in writing, attested by two or more credible witnesses, should order or appoint; she thereby appointed and ordered, that upon the death of her said son without issue, or in case her said son does not dispose either by will or deed, which shall first happen, divers sums should be given to different legatees, and to certain charitable purposes.

Appointment by will of a sum of money to several persons upon the death of testatrix's son without issue, or without making any disposition by will or deed, held to be too remote and void.

The testatrix died on the 16th of *April*, 1734, and her son, *John Rogers*, on the 24th of *June*, 1758, without issue, and without having made any express disposition of the £3000 either by will or deed. This was a bill by the representatives of some of the legatees for a sale of the premises, and payment of the legacies.

*Mr. Ambler* and *Mr. Galliard* for the plaintiffs.

There are two objections made to the claim of the legatees. The first is, that the contingency to them is too

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remote ; and, secondly, that the appointment of the testatrix is repugnant to the ownership given to the son : and had the words been no more than upon the death of my son without issue, without any words to show an intention of confining it to a failure of issue at the time of his death, it would have been too remote ; but the courts have always been anxious to gather circumstances from the will, in order to hasten the time of vesting, that they might give effect to as much of the will as possible. *Nicholls v. Hooper*, 1 P. Wms. 198. *Target v. Gaunt*, ib. 432. *Pinbury v. Elkin*, ib. 563. *Forth v. Chapman*, ib. 663. *Atkinson v. Hutchinson*, 3 P. Wms. 258. The words, in case my son does not dispose by deed or will, which shall first happen, distinctly answer both objections, because such disposition could only take place at the moment of his death : and the bequest to legatees is a proof that she had not any very remote period in her contemplation. These words do not contain an absolute gift of the property, but merely a power of appointment by deed or will, which he might execute or not as he thought proper ; and as he has not chosen to execute it, the legacies must be raised.

Mr. *Sewell* and Mr. *Willes* ; Mr. *Wilbraham* and Mr. *Hoskins* for the different defendants.

*The Lord CHANCELLOR.*

I think this as clear a case as ever came before me for my determination. I have always been as ready as any of my predecessors to lay hold of expressions of testators which might shew that they did not mean to use the words “dying without issue” in the legal and technical, but in the vulgar sense. But where testators seem to imagine that they may make further limitations of personal property than the law permits, such limitations have long since been considered as null and void. The limit-

ation in the present case is after a remote contingency, and an absolute power of disposition. There is nothing in the will to restrain the contingency to the time of *John Rogers's* death; and this limitation over is after an absolute interest was vested in, and an unrestrained power of disposition was given to him.

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Bill dismissed.

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This decree was afterwards 21st November, 1770. 3 Bro. affirmed in the *House of Lords*, P. C. Ed. Toml. 315.

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See the preceding case, *way, post.* 397, and the note and also *Bodens v. Lord Gal-* to it.

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ATTORNEY-GENERAL v. TYNDALL.

(*Reg. Lib. A. 1763. fol. 390.*)

11th June, 1763.  
8th March, 1764.  
S. C.  
*Amb. 614.*  
*Sewell, MSS.*

MARY PACKER, by her will, bearing date the 6th of November, 1754, devised all her freehold and leasehold estates to trustees, upon trust to sell and dispose of the same; and out of the monies arising by such sale, part she willed to be laid out in the purchase of a competent piece of ground for erecting and building an alms-house in the parish of St. James's, in the city of Bristol, and the other part to be laid out in the building, erecting and furnishing the said alms-house. And she willed that the whole of the monies to be laid out in purchasing the ground, and erecting such alms-house, should not exceed

Where testatrix devised her freehold and leasehold estates to trustees, which she directed them to sell, and buy ground, and erect an alms-house, and lay out the residue in land, and also gave the residue of her personal estate to the like uses; the devise of the freehold and leasehold

being void under the statute of mortmain, part of a decree at the Rolls, which declared that if the trustees could obtain the gift of a piece of ground, they might erect an alms-house (giving them two years to procure such gift), and also that they were entitled to have the assets marshalled so as to throw the debts, &c. on the leasehold, reversed on appeal by the Lord Chancellor.

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£1400; and the residue of the money arising by such sale, and all other monies she stood possessed of, should be laid out in the purchase of lands in the names of trustees, in trust, out of the rents and profits, to pay certain weekly stipends to twenty poor persons whom she had before appointed to live in the said alms-house. And until such ground and alms-house could be purchased and erected, and such lands, &c. out of which the said weekly allowance was to arise, she willed that the monies arising out of the leasehold and freehold estates should be placed out on government or real securities, and the dividend and interest applied to increase the capital fund, to answer the end of her said intended charity as near as the nature of the trust and circumstances would admit of.

Then came the following clause: "And in case my said intended charity cannot by the laws of the realm take effect in manner as I have expressed myself, then I do hereby give the money arising by sale to the said trustees, upon trust, to dispose of the same for such charitable uses, intents and purposes as shall be as near agreeable to the trusts, intents and purposes hereinbefore expressed as may be, and the laws of the land will admit." She then gave the residue of her estate to such uses, intents and purposes as aforesaid.

The cause came on for hearing first at the Rolls on the 10th of *December*, 1759, when his Honour declared the devise of the testatrix's freehold and leasehold estates for the charitable purposes was void; and directed an account of the personal estate, the Master to state the value of the leasehold estate, and costs to that time by consent, out of the estate.

The cause coming on after the Master's report for further directions on the 24th *June*, 1761, his Honour declared, that in case the defendants, the trustees, could obtain by gift a competent piece of ground in the parish of *St. James* in *Bristol*, and as near the church as might

be, for the purpose of erecting an alms-house for the poor people mentioned in the will, the charity would be entitled to have the leasehold and mere personal estate so marshalled as to throw the debts, funeral expenses, legacies and costs on the leasehold estate, in order to have the mere personal estate free and clear, to be applied to the erecting and endowing the alms-house in manner directed by the said will; and he therefore ordered that the space of two years should be allowed the said trustees for procuring, if they could, a gift of such piece of land, and in the mean time the leaseholds should be sold, and be laid out in the purchase of 3 *per cent.* consols, &c.

It now came on upon appeal by the next of kin from the above decree.

Mr. *Sewell*, Mr. *de Grey*, and Mr. *Stainsby*, for the next of kin; the *Attorney-General*, Mr. *Perryn*, and Mr. *Hoskins*, in support of the decree.

*The Lord CHANCELLOR.*

It was extremely well and forcibly observed by Lord *Hardwicke*, in the *Attorney-General v. Lord Weymouth* (a), that the true end and design of this statute of mortmain was to hinder gifts of dying persons out of a pretended or mistaken notion of religion, as thinking it might be for the benefit of their souls, to give their lands or personal estates to be invested in lands to charities which they paid no regard to in their lifetime; and therefore the act provides, "that from and after the 24th of June, 1736, no manors, lands, tenements, &c. nor any personal estate to be laid out in the purchase of lands, &c. shall be given, granted, &c. to any person whatsoever, in trust, or for the benefit of any charity."

And that learned judge appears to me throughout the

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(a) *Amb.* 20.



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several judgments which he pronounced on this statute, to have persisted with great firmness, and at the same time with great candour, in carrying it into execution; and therefore in the case mentioned, he determined on hearing the plea that a residue of lands converted into money was a void gift to a charity. In that case, and in the case of *Mogg v. Hodges* (a), he refused to marshal for the benefit of the respective charities; and his reasons appear to me unanswerable. He asked, What is the will? it is an illegal disposition to a charity: and am I to set up a compensation for that?

In the case of *Sorresby v. Hollins* (b), 6th August, 1740, Lord *Hardwicke* shewed his equality of judgment to the charity; and in the case of *Grimmett v. Grimmett* (c) even more strongly.

Having premised thus much, I come to the case under consideration (here his Lordship stated the case very fully).

This appears to me to be a new case arising upon the statute of mortmain, a law founded upon good sense and sound policy; and therefore I shall think it my duty to carry it into execution according to the spirit of the legislature. The decree at the Rolls has declared, that the devise of the freehold and leasehold is void by the statute of mortmain, which is indisputable; the freehold, therefore, descends to the heir: the remaining question is only what is to become of the leasehold and other personal estate consistently with this statute.

The specific devise of the leasehold to the charity being void, 1st, Shall the charity take it as part of the residue of the personal estate, and so the testator do *per obliquum, quod non potuit facere per directum*? Or shall the court say, in the same decree, your intent and act were illegal, but I will help you at a shift, and

(a) 2 *Ves.* 52.

(b) 9 *Mod.* 221.

(c) *Amb.* 210.

do that for you which you could not do for yourself: I will contradict the legislator, and you shall be enabled, substantially, to give your lands to a charity, the devise of which I have decreed void, because given to the same charity. This seems to me a strange construction to put upon the statute, and as strange an inconsistency in the decree.

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The mode of doing this, attempted by the present decree, is by marshalling *that* which, in the light that the court saw it, was one and the same fund; for it having decreed the specific devise of the leasehold void, it considered the leasehold as dropping into the personal estate and becoming one fund, which it marshals: this I do not understand.

The old rule of marshalling assets respects *two* different funds, and *two* different sets of parties, where one set can resort to either fund, the other only to one: it is grounded on obvious equity; it does no prejudice to any body, and it effectuates the testator's intent; but where there is no double fund, what is marshalling for the residue? to put on the void specific legacy, devised of the personal estate, the debts, other legacies and costs that the charity may have *pro tanto* out of the void legacy devised. In the case of the *Attorney-General v. Graves* (a), according to my notes, Lord *Hardwicke* said, "I shall not set up a new rule for the benefit of the charity, but they may have the benefit of the old rule. When there are general legacies, and the testator has charged his real estate with payment of all his legacies, the personal estate not being sufficient, the court has marshalled."

If, therefore, I were of opinion with the decree as to

(a) *Amb.* 155.

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the residue, I should be against this confused idea of marshalling, and set that aside.

But I am now to suppose that the void devise of the leasehold dropped into the residue of the personal estate, and that it bore the proportion of debts and legacies in average, and augmented the residue for the charity. I am of opinion this could not be done consistent with the statute of mortmain, and the intent of the testatrix: 1st, because the words of the statute are negative that no interest in land shall go to a charity; 2dly, because it was the intent of the testatrix that the trustees should take this by specific devise, and not as part of the residue of the personal estate; and, therefore, the clause whereby the testatrix gave "all the rest and residue of her personal estate to the trustees to dispose of the same for the charitable ends, intents and purposes aforesaid," must be considered to mean only the residue, exclusive of the lands particularly and specifically devised; and therefore consistently with the will and statute, the charity could at most only take such residue, were there no other objection to the devise of such residue. But I, who am bent by my judgment against all chicanery to avoid the statute, must examine the grounds upon which the devise of the residue is at all to be supported.

The decree declares, that the residue cannot be supported to purchase the site for the alms-house, but that it may to the building of the alms-house, if ground can be given: and this part of the decree is founded on the authority of the *Attorney-General v. Bowles* (a).

But that precedent has no influence on my judgment (b): 1st, because building on a site is laying out

(a) 3 *Atk.* 806. 2 *Ves.*  
 547.

(b) Mr. Ambler, in his report of this case, has repre-

the money in realty, and therefore contrary to the spirit of the statute: it improves the site, is demandable in a *præcipe*, and is a purchase of so much realty. Such a determination is opening a door to evade the statute, to those donors who are indifferent in what species of charity they bequeath their money, whose motive is the gratification of their vanity, and not the service of the poor. If these precedents were to prevail, we should see almshouses turned into palaces, and small spots of ground covered with immense buildings (a). 2dly, Because it is contrary to the intent of the testatrix, who has intended her charity to be entire, and not confounded with that of another. To make her go begging for ground is contrary to her intention, and what most likely she would not have submitted to: it is departing from the will to do an illegal act. 3dly, Because such construction is frittering away the statute, and is productive of such subtleties

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sented his Lordship as having used the following observations upon this point. "The decree in this part is founded upon precedent of the *Attorney-General v. Bowles*, which is an authority for the *Master of the Rolls*; but I feel only one authority, that of the *House of Lords*, which is a superior court; no other authority has any influence on my judgment," p. 616. It is observable that there is no trace whatever of this expression either in the copy of the judgment, which is fortunately in his Lordship's own

handwriting. from whence the above report is taken, nor in the *Sewell MSS.* We may therefore safely conclude, from the known inaccuracy of that reporter, that these words were never used.

(a) The same opinion was expressed by Lord *Rosslyn* in *Blandford v. Thackerell*, cit. *post.* But subsequent cases have clearly overruled it. *Vide* the observations of Lord *Alvanley* in *Corbin v. French*, cit. *post.* and the note at the end of this case.

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as bewilder and perplex judges. The two propositions in the statute are as clear as any in *Euclid*. 1st, You shall not give land to a charity; 2dly, you shall not realize for the benefit of a charity. If the doctrine of the *Attorney-General v. Bowles* were to prevail, land not worth £50, might become worth £20,000.

As to the gift of the general residue of the personal estate, I hold that void likewise, as it appears to me to be given to be laid out in lands and tenements. It is devised to such uses, intents and purposes as aforesaid; and the only purposes in the will are to be laid out in lands for charity. Before the statute, in case of a bill brought for the purpose, the court would have directed the residue to be laid out in land. In *Sorresby v. Hollins* the original intent was to lay out the money legally in land or otherwise; here the original intent was to lay it out in land only. The trustees cannot depart from the original intention, nor can they be permitted to let the money remain on securities. The immediate precedent clause is, 'and in case my intent cannot by law take place, the trustees are to lay out the money to such charitable uses, intents and purposes as near to my intention as can be, and the laws will permit.' Whether any use was made of that clause at the hearing, does not appear, but I am clear that it is a fraudulent and a void clause: it is inserted as a means to intimidate the heir at law, and the next of kin, and prevent their opposing the charity.

I am therefore of opinion that the decree must be reversed, except so much as relates to costs, the accounts, and securities of the money arising by sale of the leaseholds; and let the surplus be distributed according to the statute of distributions.

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Upon the argument of the *v. Downing, Amb. 555.* the case of the *Attorney-General v. Attorney-General (Mr. Yorke)*

taking notice of the present case, observed, that it did not contradict the determination in the *Attorney-General v. Bowles*, but was distinguishable from it, in respect that in the present case the trustees were to *buy* the land, in the *Attorney-General v. Bowles* they were only to *erect* alms-houses; and Lord *Northington* assented to the distinction. He said, "the foundation of his opinion was, that the testatrix had directed the ground to be *bought*, and therefore that he should have been disappointing her intention if he had given liberty to erect an alms-house in case any body would have given the land." This is the true ground and reason of the present decision.

In the earlier cases of *Vaughan v. Farrer*, 2 *Ves.* 182. *Castril v. Baker*, cit. *ib.* and the *Attorney-General v. Bowles*, the doctrine of which was not affected by this determination; it had been held, that land might be built upon though there was none already in mortmain. The construction put by Lord *Hardwicke* upon the word *erect* was, that it did not ne-

cessarily imply to build, much less a purchase of ground for building: that it might mean merely endowment or foundation. Subsequent cases, however, beginning with *Pelham v. Anderson*, *post.* 296, have given a different construction to it; and it is now considered that, "*primâ facie*, the testator must be taken to mean by that word, that land shall be bought." 8 *Ves.* 191.

It is now, therefore, as observed by Lord *Eldon*, "clearly established, that unless the testator distinctly points to some land already in mortmain, the court will understand him to mean, that an interest in land is to be purchased, and the gift is not good." 9 *Ves.* 544. The cases on this point are, *Pelham v. Anderson*, *post.* 296. *Attorney-General v. Hutchinson*, *Amb.* 751. & cit. 1 *Bro. C. C.* 444. *n.* *Foy v. Foy*, 1 *Cox.* 163. *Attorney-General v. Bishop of Chester*, 1 *Bro. C. C.* 444. *Brodie v. Duke of Chandos*, cit. *ib.* *Attorney-General v. Bishop of Oxford*, cit. *ib.* *Attorney-General v. Nash*, 3 *Bro. C. C.* 588. *Blandford v. Thackerell*, 4 *Bro. C. C.* 394. *S. C.* 2 *Ves.*

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when there are none such living at the time, such issue can only take by way of limitation, because they cannot take by purchase, not being in *esse* at the time of this bequest; therefore if it had related to real estate, it must have given *Elizabeth Doidge* an express estate tail: and it has been determined in many cases in this court, which have now established it as a principle, that where the first taker takes a chattel by express words of entail, it cannot be devised over. I should not only contradict the rules and principles of legal construction, but should also in this case defeat the will of the testator, if I did not understand the words *to my wife, and the issue of her body*, to be equivalent to *my wife, and the heirs of her body*. It is a rule which runs through the cases in this court, that after an express limitation of a term or other chattel, it cannot be devised over.

The next clause in the devise is the power of disposing by will given to his wife. Now supposing this to be a power of appointment, as is contended for by the defendants, the appointee, if there had been any such, must have taken under Mr. *Doidge's* will, as if he had been named expressly therein, and then the devise would have been, "to my wife and the issue of her body; failing such issue, to *A. B.* the appointee, with remainders." Now it is clear that this remainder to *A. B.* would not have been good, being after general failure of issue; and the devisees over were plainly substituted by the testator to take the same estate which the appointee, if there had been any such, would have taken. If he intended to give it to her, and the heirs of her body, he could not propose to give it over upon the contingency of her not disposing of it, and her not leaving issue at her death. Suppose that she had had a son; upon the construction contended for by the defendants, it must have remained a contingency till her death; and if the son had wanted part of this money

to put him out apprentice, or settle him in the world, nothing could have been raised for that purpose. The testator took it for granted that she would by the first part of the bequest have a power over the money, and therefore he does not by his will give her the power, but supposing that she had, gives the money over if she did not exercise it: he was not mistaken in his intention, but mistook his power.

I think this case is as strong again as those cited by Mr. *Yorke*; it would be very strange to alter a particular estate, given by the first part of the devise, by what appears to me a forced construction of the latter part. I am therefore of opinion Mrs. *Doidge* took an absolute interest in the legacy of £3000; that the limitation over to the persons in the said will is void, and must decree for the plaintiffs accordingly.

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*Vide Bodens v. Lord Galway, post. 297, and the cases cited in the note to it.*

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CAMDEN v. MORTON.

(Neither in the Register's Book, nor the Minute Book.)

*Pasch. 1764.*  
*S. C.*  
*Serjt. Hill, MSS.*  
*Sewell, MSS.*

BROWN v. QUILTER.

(*Reg. Lib. A. 1763. fol. 483.*)

1st June,  
*S. C.*  
*Amb. 619.*  
*Serjt. Hill, MSS.*  
*Sewell, MSS.*

THE authority of these *v. Wright*, determined by cases, as well as that of *Steele Lord Apsley*, cit. 1 T. R. 708.

Whether lessee of a house, who is under cove-

nants to repair, accidents by fire excepted, the house being burnt down, and lessor, who had insured, having received the insurance money, but neglecting to rebuild, is entitled to an injunction till the house is rebuilt, against an action at law brought by the lessor for the rent, *quære?*



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having been much shaken, if not entirely over-ruled by the late cases of *Hare v. Groves*, 3 *Anstr.* 687, and *Holtzappfell v. Baker*, 18 *Ves.* 115, the Editor has not given any report of them. The point in which they differ from these subsequent decisions, is, the circumstance, that in all of them the landlord had insured and received the insurance-money: and therefore had the value of the thing which was the subject of the contract with the lessee. As to him, therefore, no loss had happened. Accordingly, the Lord Chief Baron, in *Hare v. Groves*, suggested that there "might be some equity to say, that he should not keep the house, or its value, and receive the rent also, but should either put the value down again for the use of the lessee, or remit the rent." It is difficult, however, to conceive, as was observed in the last of these cases (p. 118), how that distinct contract, merely for the advantage of the lessor, with which the lessee has no concern, can affect the right as between them.

25th, 26th, 27th,  
 & 30th of June,  
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 S. C.

*Amb.* 467.  
*Serjt. Hill*, MSS.  
*Sewell*, MSS.

Defective execution of a power refused to be supplied in favour of a natural son against persons claiming under a subsequent valid execution of it.

### BRAMHALL v. HALL.

(*Reg. Lib. A.* 1763. *fol.* 501.)

ANN HATTERSLEY being seised in fee of certain premises at *Dalton* in the county of *York*, previous to her marriage with *George Bramhall*, entered into articles, bearing date the 14th of *September*, 1727, whereby the said *George Bramhall* covenanted with trustees, that the said *Ann Bramhall* should have full power and authority, either by will or by deed, as she should think most convenient, to give away and dispose of the said premises, from and after her decease, to any person or persons whatsoever, and their heirs and assigns for ever, and

without the hindrance, &c., of the said *George Bramhall*, or any person claiming under him : and that the said *George Bramhall*, his heirs, &c. should, upon the request of the said trustees, do such further acts for confirming the same, as should be thought requisite. The marriage took effect.

*Ann Bramhall* had a son by the said *George Bramhall*, previous to the marriage, called sometimes *Hattersley*, and sometimes *Bramhall*, and who was then married to the plaintiff.

By indentures of lease and release, of the 3d and 4th of *September*, 1735, reciting the articles, *Ann Bramhall*, without her husband, in consideration of a portion then had, or to be had, by the said *Thomas Bramhall* (the natural son), with *Elizabeth*, his then wife, and for natural love and affection for her son, and providing a maintenance and jointure for the said *Thomas* and *Elizabeth*, after her decease, and settling the premises, by virtue of her power and authority, granted, bargained, and sold the premises to trustees, from and after the death of herself, to the use of the said *Thomas Bramhall* (the natural son), for life ; remainder to *Elizabeth* his wife for her life, for her jointure, with divers remainders over : but if the said *Thomas Bramhall* should die, and leave no issue by the plaintiff, then that the said trustees should stand seised of one moiety to the use of the right heirs of the said *Ann Bramhall*, and of the other to the use of the plaintiff for life, with like remainder over.

In 1740, *Ann Bramhall*, together with her husband, *Thomas Bramhall*, levied a fine of the premises, and by indenture, bearing date the 7th of *November*, the uses were declared to *Ann Bramhall* for life ; remainder, as to one moiety, to trustees, upon certain trusts ; as to the others, to the same uses as were limited by the deed of 1735, omitting only the limitation to *Elizabeth* for life.

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*George Bramhall*, and *Ann* his wife, and *Thomas Bramhall*, her natural son, being dead, in 1758, *Elizabeth*, his widow, brought this bill to be let into possession \*of the estate for her life, and for an account of the rents, &c., claiming under the deed of 1735.

The defendants, by their answer, contended, that the indentures of 1735 were voluntary, and made without consideration, and that the plaintiff was not entitled to have any defect made good, and that no portion was paid with the plaintiff as recited in the deed.

The *Solicitor-General*, Mr. *Sewell*, and Sir *Anthony Abdy* for the plaintiff.

It must be admitted, that the deed of 1735 is void at law, as a declaration of uses, but equity will supply all defect in it. *Fothergill v. Fothergill*, 2 *Freem.* 257, 1 *Eq. Ab.* 222. *Smith v. Ashton*, 1 *Ch. Ca.* 263. *Stapilton v. Stapilton* (a).

The wife, on her marriage, reserved a power of appointment, and the husband agreed to join. By the deed of 1727, her power could be executed even at law, the husband joining with her; and if he had refused, this court would have ordered him; and though equity will not interpose for a volunteer, yet, in all cases, except against purchasers and creditors, it will, upon consideration of natural affection.

Mr. *Yorke* and Mr. *Hoskins* for the defendants.

Plaintiff is a volunteer, and has therefore no equity upon which to ground her application. There is a total defect in the commencement of the grant, from the want of a fine. Where a fine is levied, it will, in general, let in all legal incumbrances, but here the fine is levied by different parties, and expressly to different uses. When there is any meritorious consideration, the court always

(a) 1 *Atk.* 2.

finds some equitable ownership or agreement to support and carry into execution. If a power in a settlement be \*defectively executed in favour of children or creditors, the court will aid. So also where a feme-covert executes her power defectively ; so in cases of equitable ownership, where the estate is in the husband. Here there is no meritorious consideration ; no blood, no merit ; it is all bounty. In *Fursaker v. Robinson*, Prec. Can. 475, the court refused to supply a surrender of copyhold for a natural daughter, on the ground of there being no consideration of blood. *Stapilton v. Stapilton* was aided by the legal reasoning, and the very peculiar circumstances of the case. *Vane v. Fletcher*, 1 P. W. 354. *Shaw v. Standish*, 2 Vern. 326.

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I am of opinion, that the plaintiff is not entitled to relief, for it does not appear that she is any thing more than a volunteer. And as nothing would pass by that deed at law, either as a declaration of uses, or in any other way, equity cannot interfere to supply the defect, as being a defective execution of a power. For it is merely voluntary, as it does not appear that any portion was then paid as the consideration of the deed, or any future portion afterwards paid, as seemed to be intended, or supposed to be, by the deed. This defect, likewise, is prayed to be supplied against those who claim under a subsequent effectual execution of the power and legal conveyance of the estate ; a case much less favourable than if it had been against the heir only of the grantors. But even against those I am of opinion, the plaintiff could have had no relief: for the deed of 1735 is not grounded upon the considerations even of blood (according to the common law idea of blood), which would have been a good, though not a valuable consideration. I know of no case

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where a defective execution of a power has been supplied in equity in favour of a natural son, to whom no meritorious consideration could arise.

Bill dismissed.

Mr. Sugden, in his valuable treatise on Powers, is of opinion, that Lord Northington was not correct in holding a consideration to be necessary; and relying upon the case of *Rippon v. Dawding*, Amb. 565, which was decided on the authority of *Wright v. Lord Cadogan*, post. 239, observes that equity ought to have lent its aid, on the principle that the agreement, having been made on marriage, the husband would be compelled to make a legal set-

tlement. It is observable, however, that in those cases, the court interfered against the heir at law of the contracting party: in the present case there was a subsequent effectual execution, against which the court refused to interpose in behalf of one whose equity as arising from the marriage contract, was in no respect superior to that of the persons claiming under the subsequent valid execution.

27th, 29th, 30th,  
 of June.  
 2d of July,  
 1764.  
 S. C.

Amb. 624.  
 Sewell, MSS.

1905. 1 Ch. 639.

SHELDON v. COX.

(Reg. Lib. B. 1763. fol. 435.)

Mortgagee held, notwithstanding a recital in the declaration of trust, to have obtained a security to the extent of the interest of mortgagor in the premises.

Notice to agent held to affect principals, and no difference in this case by his being owner of the estate.

Notice of an unregistered mortgage held to affect subsequent mortgagees, who had registered.

By an act of parliament, 29 Geo. 2. Dr. Markham and Mr. Salter were empowered to purchase estates in and near Dean's Yard, Westminster, to enable them to

build a square, &c. for the better accommodation of the school, &c.

The defendant *Cox* (who was a barrister, and appeared to have taken the management of the affair upon himself) purchased a parcel of ground with old houses upon it, which was held of the dean and chapter of *Westminster*, and having got a renewal according to the powers in the act for ninety-nine years, on the 12th of *May*, 1757, borrowed £3500 of the plaintiff, Colonel *Sheldon*, and gave him a declaration of trust of the premises as a security, and also delivered him the renewed leases; but this security was not registered. The declaration recited the act of parliament, that *Markham* and *Salter* had assigned all their powers under the act to *Cox*. It also recited the purchase of the ground, and the renewal of the leases by *Cox*, and also, that it was the intent of all parties, that after such estates should be bought in, *Cox* should, with all convenient speed, dispose of the ground upon which such new square and street were intended to be built at proper ground rents, and when the same were completed, should sell such ground rents, and apply the money arising thereby in discharge of all money laid out in the purchase of the said estates, and other expenses attending the scheme proposed by the act of parliament, and to account with *Markham* and *Salter* for the residue thereof.

*Cox* having built nine houses, four of which were erected upon the ground, in security to plaintiff, grants a lease of all the nine to the defendant *Hoare*, reserving a ground rent, which was said to be done for the purpose of establishing a rent, and *Hoare* was declared in writing to be only a trustee in such lease for *Cox*.

On the 13th of *March*, 1758, an assignment was made by *Hoare* to *Markham*, of the four houses for securing £2800.

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On the 22d of *July* an assignment is made of all the nine houses to defendant *Drummond*, by *Hoare*, for securing £5000, and by an indorsement they are afterwards made a security to *Drummond* for £1000 more.

Neither *Drummond* nor *Markham* had actual personal notice of the mortgage to the plaintiff, nor of each other's mortgage. But they admitted in their answers, that they had employed *Cox* as their sole counsel and agent in these transactions. They had both registered their mortgages, which the plaintiff had not done.

This was a bill by the plaintiff for a sale of the premises, and to be paid the money he had advanced in the first place.

*Mr. Yorke* and *Mr. Sewell* for the plaintiff.

Three questions arise for the determination of the court upon the present case. The first is as to the extent of the plaintiff's security, whether it is confined to the ground rents, or extends to the buildings? There seems little difficulty in that point. *Cox* intended to give a security to the extent of his interest in the premises, and the plaintiff to receive it. The whole premises are mentioned in the declaration of trust. The second question is upon the point of notice, whether the defendants *Drummond* and *Markham* are to be affected by the notice given to *Cox*. It has been long since decided that notice to agent affects the conscience as much as notice to principal. *Brotherton v. Hatt*, 2 *Vern.* 574. *Jennings v. Moore*, 2 *Vern.* 609. The third question is, whether notwithstanding such notice the defendants are not entitled to priority by reason of their securities being registered before the plaintiffs? The object of the registering act was to prevent prejudice to *bonâ fide* purchasers, and is directed against prior and secret conveyances. But where the subsequent purchaser or mortgagee has due notice, the evils against which the statute intended to guard, viz. secrecy,

do not exist. It is like the practice upon the statute of *Hen. 8.* on conveyances by bargain and sale enrolled. It never was doubted upon that statute that notice would not affect the conscience of a subsequent purchaser. In *Le Neve v. Le Neve* (a) this doctrine is well laid down by Lord *Hardwicke*, and the cases cited by him can leave no doubt upon the point. Lord *Forbes v. Neelson* (b). *Blades v. Blades* (c). *Chivall v. Nicholls* (d).

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The *Solicitor-General* and Mr. *Skynner*; Mr. *Comyn*; Mr. *Wedderburne* and Mr. *Madocks*, for the different defendants.

As to the point of notice; the plaintiff left *Cox* in the possession of the legal estate which has now come to *Drummond*; he is not a purchaser with actual notice, which he positively denies by his answer. It is at most constructive notice, which this court ought to be very unwilling to act upon. As to the extent of the security, it was evidently the intention of the plaintiff and *Cox* to make the ground rents only a security to the plaintiff. The recital of the declaration of trust mentions that *Cox* was to dispose of the ground upon which the new squares and streets were to be built at proper ground rents. They only intended the ground rents to be a security, in order to leave room to *Cox* to execute the general scheme, which could not be done if the security were to extend to the buildings.

*The Lord Chancellor.*

I am clearly of opinion that Colonel *Sheldon* was to have a security to the extent of *Cox's* interest, and that

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| (a) <i>Amb.</i> 436. 3 <i>Atk.</i> 646.                                    | (c) 1 <i>Eq. Ab.</i> 358. |
| 1 <i>Ves.</i> 64.  | (d) 1 <i>Str.</i> 664.    |
| (b) <i>Nom. Forbes v. Deniston</i> , 1 <i>Ves.</i> 67. 4 <i>Bro. P. C.</i> |                           |
| Ed. <i>Toml.</i> 189.  |                           |



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the recital in the declaration of trust makes no difference. If a man had taken a building lease of *Cox*, with notice of the plaintiff's mortgage, I think he would have been liable to the plaintiff's demand; and though it would have been a very hard case, and I should have felt great pain in making such a decree, I think I should have been bound to declare him so.

As to the second point, it is a fixed and settled principle that notice to an agent is notice to the principal. If it were held otherwise it would cause great inconveniences, and notice would be avoided in every case by employing agents. *Cox* being owner of the estate makes no difference. He acted in different capacities; and it is therefore the same as if it had been in different persons. There is no difference also between personal and constructive notice in its consequences, except as to guilt (a).

3dly. The statute of *Anne* (b) was only intended to protect purchasers against secret conveyances. It does not affect the question of notice. It leaves that as if the statute had never been made (c).

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| <p>(a) <i>Vide</i> as to constructive notice, <i>Howorth v. Deem</i>, ante, Vol. I. 351.</p> <p>(b) 7 <i>Anne</i>, c. 20.</p> <p>(c) <i>Vide</i> <i>Morecock v. Dickinson</i>, Amb. 678. <i>Jolland v. Stainbridge</i>, 3 Ves. 478. and see all the cases elaborately commented upon in the judgment in <i>Bushell v. Bushell</i>, 1</p> | <p><i>Sch. &amp; Lef.</i> 102. <i>et vide</i> <i>Biddulph v. St. John</i>, 2 <i>Sch. &amp; Lef.</i> 532. But in a <i>Court of Law</i> the deed last registered is void, although the party claiming under it had notice of the prior execution of the first. <i>Doe v. Alsop</i>, 5 <i>B. &amp; A.</i> 142.</p> |
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HALE v. BECK.

(Reg. Lib. A. 1763. fol. 368.)

7th and 9th July,  
1764.  
S. C.  
Sewell, MSS.

*ELIZABETH HALE* by her will, bearing date the 6th of *March*, 1758, gave to trustees £300 upon trust, from time to time during the widowhood of the plaintiff *Anne Hale*, to place the same out at interest upon such security as they should think meet; and the interest and produce thereof from time to time to pay to the same plaintiff during her widowhood; and if she should marry or die, then the interest of the said £300 to be paid to the plaintiff *Anne Hale*, her daughter, an infant, in trust for her till she came to the age of twenty-one years: the testatrix likewise gave the sum of £1000 to the same trustees upon trust to pay the interest to the plaintiff till she came of age; and in case she was not entitled to a certain sum under the marriage settlement of her father, then to pay the whole of the said sum of £1000 to her, her executors, administrators, or assigns.

Legacy to trustees to be put out upon security, the interest to be paid to *A.*, and in case she marry or die, the interest to be paid to *B.*, in trust for her till she came to the age of twenty-one years: held that *B.* was absolutely entitled to the legacy.

One question in this cause was, whether the plaintiff, the infant, was entitled to the legacy of £300 absolutely.

*The Lord CHANCELLOR*

Thought that though this legacy was expressed to be only given in trust during infancy, yet that the infant was entitled to it absolutely (a).

(a) *Vide Phillips v. Cham- Peat v. Powell, ante, Vol. I. berlayne, 4 Ves. 51. Et vide 479.*

11th July,  
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THE ATTORNEY-GENERAL v. TYLER.

(*Reg. Lib. A. 1763. fol. 392.*)

In an information at the relation of a lunatic a proper relator was directed to be appointed, who might be responsible for the costs of the suit.

THIS was an information at the relation of *Griffiths Vaughan*, who was a lunatic. Mr. *Sewell*, Mr. *Hoskins*, and Mr. *Madocks* now moved that a relator might be appointed in this cause, who might be responsible to the defendants for the costs of the suit in case the said information should be dismissed; or otherwise, that the defendant, *Thomas Vaughan*, who had wholly acted as solicitor in the cause, might enter into a recognizance in such penalty as the court might direct in case such information should be dismissed; and that all further proceedings might be stayed till such relator be appointed, or such recognizance entered into.

The *Solicitor-General* for the relators.

The *Lord Chancellor* accordingly directed that all further proceedings in the cause should be suspended until a proper person should be named as relator (*a*).

(*a*) See *Mitford* on Pleading, last ed. 23, and the note to it, where this case is alluded to; it appears from a note of this case in *Dickens*, that the same point was made before Sir T. *Sewell*, 1 *Dick.* 378.

PHILPOT v. WILLIAMS.

(Reg. Lib. B. 1763. fol. 441.)

16th & 17th July,  
1764.  
S. C.  
Serjt. Hill, MSS.

*Knox*, a merchant at *Bristol*, by deed poll, bearing date the 8th of *September*, 1761, assigned to *Light* and *Hutchinson* of *London*, two entire cargoes of tobacco and pig-iron, then laden, or which should be laden on board the *King of Prussia* and *Constant Matthew*, consigned to him at *Bristol* from *Virginia*: and the consideration was mentioned to be the sum of £8000, part of a larger debt due from *Knox* to *Light* and *Hutchinson*.

By indenture bearing date the 21st of *November*, 1761, *Light* and *Hutchinson*, in consideration of the sum of £3000 lent them by the plaintiff, assigned to him the said two cargoes by way of security. No vouchers or documents relating to these cargoes were ever delivered over either to *Light* and *Hutchinson* or to the plaintiff: the ships belonged to *Knox*, so that there could be no charter-party; and it was proved that in the *Virginia* trade it was not customary to send the bills of lading otherwise than by the ship which brought the cargo.

On the 3d of *December* the *King of Prussia* arrived in the port of *Bristol*, of which *Knox* sent *Light* and *Hutchinson* advice, which they received in *London* on the 5th. In the interval between the 5th and the 11th *Knox* entered the cargo at the custom-house, and landed part of the goods, which he sold. Neither the plaintiff nor *Light* and *Hutchinson* took possession of the cargo till the 11th, on which day *Knox* committed an act of bankruptcy.

*A.* by deed assigns the cargoes of two ships to *B.* and *C.*, but has no charter-party or bill of lading to deliver to them. On the arrival of one of the ships he assigns to another person, and afterwards commits an act of bankruptcy: held that *B.* and *C.* not having been ready to take possession of the ship on her arrival had thereby permitted *A.* to continue reputed owner, under the statute of 21 Jac. 1. c. 19.

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This bill was brought by the plaintiff to have the money arising from the sale of these cargoes (which had by the consent of all parties been sold, subject to the present question,) paid to the plaintiff. The defendants were *Lady Williams*, who claimed under a subsequent assignment from *Knox*, the assignees, and *Light and Hutchinson*.

Mr. *Sewell* and Mr. *Comyn* for the plaintiff; Mr. *Yorke* and Mr. *Hett* for the defendants *Light and Hutchinson*, in the same interest with the plaintiff.

Two objections are made to the claim of the plaintiff. 1st. That there was no proper assignment. Ships at sea and cargoes are assignable though there be no delivery; though it is prudent to have a bill of sale or bill of lading, but in the present case the impossibility of an actual delivery takes it out of the statute of *Elixabeth*. The second objection is, that *Knox* was left to order and manage the cargoes, and was in such management at the time of the act of bankruptcy. The statute of *James* is directed against any person, with consent of the true owner, keeping possession of goods. Therefore if the goods are at home, there should be a delivery of them; if they are abroad, the documents, as bills of lading, charter-parties, &c. should be delivered. Now here there was nothing left in the hands of *Knox* to deliver.


Mr. *Ambler* and Mr. *Madocks*, Mr. *Willes* and Mr. *Perryn* for the other defendants.

*The Lord Chancellor.*

Although it has been allowed that a merchant having a cargo actually delivered on board of a ship consigned to him, or having a ship at sea, may assign such cargo or ship before its arrival, yet it is necessary that in every such case all the proper documents should be delivered over to the assignee. Thus, if the assignment be of the

ship, the bill of lading must be assigned; or if of goods, the charter-party or bills of lading. If the fact be that none of these documents exist, yet the party to whom the ship or goods are assigned over should be ready at the spot where the ship is expected to arrive, in order to be ready to take immediate possession. And this is founded on solid justice; because were he to leave the ship or goods for a moment in the possession of the assignor, he might dispose of them, and commit great fraud and imposition on unsuspecting persons; for as consignee in possession he has an apparent right to dispose of the goods, or to assign the invoices or bills of lading. It is therefore at his own peril where any person takes such naked assignments without any document whatsoever.

In the present case the bill of sale was in itself void, for it is of cargoes laden or to be laden; and it has not been shewn that any were in fact there actually laden on board. *Knox*, therefore, had nothing to assign; and his bill of sale was fraudulent, and within the statute of *Elizabeth*. I also think that this case comes within the statute of the 21 *Jac.* I. c. 19. the goods being in the possession of *Knox* at the time he became a bankrupt. I must therefore dismiss the bill.

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The transfer or mortgage of a ship or cargo at sea is generally made by an assignment of the bills of lading, &c. But a bill of lading is by no means a necessary instrument for the transfer of property in goods consigned to the owner. If the best delivery is given that the nature of the case will admit of, it will take it out of the statute. *Brown v. Heathcoat*, 1 *Atk.* 160. *Ex parte Matthews*, 2 *Ves.* 272. *Gillespy v. Coutts*, *Amb.* 652. *Atkinson v. Maling*, 2 *T. R.* 464. *Ex parte Stadgroom*, 1 *Ves. jun.* 163. 2 *Cox*, 234. *Manton v. Moore*, 7 *T. R.* 67. *Jones v.*

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*Dwyer*, 15 *East*, 21. *Meyer* Where a ship however was known to be in a foreign port, it was held not to be necessary for the mortgagee to take possession of her till her arrival in *Great Britain*. *Ex parte Matthews*, ante. *Hall* *parte Batson*, 3 Bro. C. C. v. *Guerney*, Co. B. L. 333. 362.

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18th July, 1764.  
*S. C.*  
*Amb.* 451.  
*Core*, MSS.

THE ATTORNEY-GENERAL v. HEARTWELL (a).

Testator by will executed previous to the statute of 9 *Geo.* 2. devises his real estate and also his personal to be laid out in land for a charity; by a codicil subsequent to the statute not attested he confirms the will: held that it operates as a new will, and that the bequest of the personal estate is void.

*RICHARD HEARTWELL* by his will, bearing date the 13th of *December*, 1734 (which was previous to the statute of mortmain (b)), devised all his real estate, and also after giving divers legacies, bequeathed the residue of his personal estate to be laid out in land, and settled to certain charitable uses.

By a codicil, bearing date the 16th of *July*, 1739, (made after the statute), and not attested by three witnesses, after giving certain legacies, he confirmed the dispositions in his will.

The testator died on the 11th of *August*, 1739, and this was an information to have the real and personal estate applied according to the directions in the will.

On the opening of the cause it was treated by the

(a) The Editor has not (b) 9 *Geo.* 2. c. 36. the time been able to find any entry of mentioned by the statute is this decision either in the from and after the 24th of Register book, or in the *June*, 1736. minute book.

counsel for the information as a question already settled and determined by the cases of *Ashburnham v. Bradshaw* (a), and *Willett v. Sandford* (b).

The Lord Chancellor, however, started a distinction between those cases and that part of the present case which related to the devise of the residue of the personal estate to be laid out in land; in those cases the devise was of real estate, here of personal, and a will speaks at different times with respect to the different estates.

(This was a surprise upon the counsel on all sides, who were not prepared to speak to this question. However it was argued *instante Amb.*)

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*The Lord Chancellor.*

I shall always think myself happy when I can by authority of law control foolish and superstitious acts of persons disposing of their estates in mortmain.

The distinction in *Ashburnham v. Bradshaw* is not now to be disputed. It was founded upon the certificate of eleven judges, though I think a great deal might be said against the determination.

The true reason why a will of land takes effect from the making is, because a man is not presumed to give more than he had at the time. It might have been held that a will of land is not complete till death, and that till then it is ambulatory. The devise in that case would have been within the statute. However the judges were of a different opinion.

That was the case of a real estate. But as of a personal estate it admits of a different construction. It must be taken to be such as he leaves at the time of his death. The statute makes an intestacy.

(a) 2 Atk. 36.

(b) 1 Ves. 178. cit. Amb. 452.



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words, or by clear and manifest implication ; the instrument must contain some provision inconsistent with the assertion of the right to demand dower. *Strahan v. Sutton*, 3 *Ves.* 249. *Thompson v. Nelson*, 1 *Cox*, 447. *Birmingham v. Kirwan*, 2 *Sch. & Lef.* 444. *Lord Dorchester v. Earl of Effingham*, *Coop. Rep.* 319. *Chalmers v. Storill*, 2 *V. & B.* 222. *Dickson v. Robinson*, 1 *Jacob*, 503. *Vide also Clancy*, p. 230, *et seq.* 3d ed.

There has, however, been a considerable difference of opinion as to the application of this rule to the case of a devise of an annuity to the widow, charged upon the real estate. The first case in which the question arose (for the early cases cited in the argument merely decided that the gift of an estate to another person did not exclude the wife from claiming dower) was that of *Pitts v. Snowden*, before Lord *Hardwicke*, cit. 1 *Bro. C. C.* 292, who held, that a devise to the widow of an annuity, with a clause of entry, did not bar her of her dower. This was followed by the present

decision against the claim of the widow ; but it does not appear that *Pitts v. Snowden* was cited : it is indeed most probable that it was not, as Lord *Northington* would hardly have overruled the decision of so great an authority, without having noticed it, and stated his reason. The next case was *Villareal v. Lord Galway* (*Amb.* 682. and more fully reported 1 *Bro. C. C.* 292. n.) before Lord *Camden* ; who, having the two conflicting authorities before him, adopted the opinion of Lord *Northington* in the present case, and was afterwards followed by Sir *Thomas Sewell* in *Jones v. Collier*, *Amb.* 730 ; Lord *Thurlow* in *Boynton v. Boynton*, 1 *Bro. C. C.* 445. ; and Mr. Justice *Buller* in *Wake v. Wake*, 3 *Bro. C. C.* 255. 1 *Ves. jun.* 335. The opinion of Lord *Hardwicke*, on the other hand, in favour of the claim to dower, has been adopted by Lord *Rosslyn* in *Pearson v. Pearson*, 1 *Bro. C. C.* 291 ; Lord *Thurlow* in *Forster v. Cook*, 3 *Bro. C. C.* 347, and received considerable countenance in the elaborate judgment of Lord *Alvanley* in

*French v. Davies*, 2 *Ves.* jun. 572, who, however, did not go the length of giving any determination upon the subject; that case only deciding, like *Middleton v. Cater*, 4 *Bro. C. C.* 409. and *Greatorex v. Cary*, 6 *Ves.* 615., that an annuity claimed out of a mixed fund, composed of the real and personal estate, did not bar the widow.

Though the number and weight of these authorities are thus nicely balanced, yet it seems probable, both from the more recent date of the decisions in favour of the claim to dower, and from the

language which the court has adopted in those and similar cases, that a stronger indication of intention would now be required, in order to put the widow to her election, than the mere devise of an annuity, with a power of entry to enforce the payment of it. This conclusion also derives great support from the late decisions, that the claim to dower is not barred by a devise to the widow of land for life, which is part of the same estate out of which she claims dower. *Birmingham v. Kirwan*. Lord *Dorchester v. Earl of Effingham*, *cit. sup.*

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WRIGHT v. LORD CADOGAN.

*Et à contra.*

(*Reg. Lib. B.* 1764. *fol.* 83.)

9th, 12th, 13th  
 & 14th Nov.  
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*S. C.*

*Amb.* 468.  
*Serjt. Hill*, MSS.

FRANCIS SMITH, alias *Carrington*, upon his marriage with *Mary*, the sister of Sir *Henry Englefield*, by his

A woman being entitled to the trust of a reversion in fee of

lands, by articles previous to her marriage, reserves to herself a power of disposing of all her estate to such uses as she should think proper: an appointment afterwards made by her in favour of her husband and children held good, although no conveyance of the reversion was ever executed.

Appointment to all and every the daughter and daughters of *A.* and the heirs of their body and bodies, and in default of such issue, over; there being only two daughters, and one of them dying under twenty-one without issue: held, that the surviving daughter was entitled, though there were no cross remainders.

Testator gives to his executor an annuity of 200*l.* charged on his real estate and payable at certain specified periods; by a codicil, attested by two witnesses only, he gives him another annuity of 100*l.* payable as mentioned in his will: held, that the executor was entitled to both, the latter annuity being payable out of his personal estate.

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marriage settlement, dated the 27th February, 1730, conveyed his real estates in the counties of *Lincoln, Leicester, Warwick, and Salop*, to the use of himself for life, subject to a rent-charge of £500 *per annum*, for his intended wife, and chargeable therewith to the use of Lord Cadogan, Sir Henry Englefield and other trustees, for 500 years, for securing the same, and to raise portions for younger children in case of issue male; remainder to his first and other sons in tail male; remainder to certain other trustees for a term of 600 years, to raise £8000 for daughters' portions, in case there should be no issue male; remainder to his first and other sons by any after taken wife; remainder to his uncles, *Charles Smith* and *William Smith*, successively, in strict settlement, with remainder to his own right heirs. Two powers of revocation were reserved: the one enabling Mr. Carrington to revoke the remainder to *Charles Smith*, and all the uses subsequent thereto, and by any writing or writings to appoint new uses; the other enabling him, with the consent of his wife and the trustees of the term of 500 years, to revoke all or any of the uses of the settlement.

There was issue of the marriage only one daughter, *Mary Theresa*.

By indentures of lease and release of the 12th and 13th of October, 1748, Mr. Carrington executed the second power of revocation as to the *Leicestershire* estates, and conveyed the same to Lord Cadogan and Sir Henry Englefield, upon trust, to sell and pay debts.

By indentures of lease and release of the 13th and 14th of October, 1748, he executed the second power of revocation as to the *Warwickshire* and *Shropshire* estates, and re-settled them to the same uses, &c. as were contained in the marriage settlement; and also by indenture of bargain and sale, dated the 15th of October, 1748, he conveyed the *Lincolnshire* estate to the same trustees

for payment of debts, and to indemnify them against charges, &c.

\* Mr. *Carrington*, by his will, dated the 31st *January*, 1748, after reciting the settlement of the 14th of *October*, 1748, and the power therein contained to revoke and new limit the estate, revoked the said estate for life to his uncle *Charles Smith*, and all the subsequent uses; and in case the said testator died without issue male, devised his *Warwickshire* and *Shropshire* estate, the uses whereof he had thereby revoked as aforesaid, to Lord *Cadogan*, Sir *Henry Englefield*, and *William Plowden*, and their heirs, upon trust, by sale or mortgage to raise money for the payment of his debts, &c. and the legacies and rent-charges thereby given; and among others, he gave to his brother-in-law, the said Sir *Henry Englefield*, one yearly rent-charge of £200 for his life, clear of all taxes and deductions, payable half-yearly, at *Lady-day* and *Michaelmas-day*; the first payment to be made on such of the said feasts as should next happen after his decease without issue male, as aforesaid, with powers of entry and distress for the recovery thereof. And subject to the trusts in the said trustees, he limited his said estate to his uncles, *Charles Smith* and *William Smith* successively, in strict settlement, with remainder to his own right heirs.

As to all his personal estate of what nature or kind soever, he gave the same to his said daughter, *Mary Theresa Carrington*, if she should live to attain the age of twenty-one years; but if she should happen to die under that age, he gave the same, and all the profits arising therefrom, to his uncle, *Charles Smith*, for life, and afterwards to his uncle *William Smith*.

By a codicil, dated the 19th of *May*, 1749, and attested by two witnesses only, reciting, that in his will he had bequeathed only £200 a year to his dear brother,

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Sir *Henry Englefield*, he bequeathed to him the additional sum of £100 a year more, payable to him as mentioned in his will.

\* Mr. *Carrington* died on the 21st of *May*, 1749, leaving his widow, and *Mary Theresa*, his only child.

*Charles Smith*, the testator's uncle and first devisee in strict settlement, died on the 27th of *August*, 1753, without issue; and *Mary Theresa* on the 1st of *May*, 1754, intestate, and without issue, and under the age of twenty-one; and the remainder in fee, subject to the estate for life to *William Smith*, and the limitations to his first and other sons, descended in moieties to *Constantia Wright*, then a widow, and mother of the plaintiff, and *Catharine* (who was then and continued to be unmarried), the sisters of the testator, and aunts and coheirresses at law of Miss *Carrington*.

In 1755, a marriage having been agreed upon between the said *Constantia* and the defendant, *Peter Holford*, by indenture, dated the 15th of *September*, 1755, between the said *Peter Holford* of the first part, the said *Constantia Wright* of the second part, and Sir *Edward Smith*, baronet, and *Thomas Bramston*, esquire, of the third part, reciting (among other things) that the said *Constantia Wright* had great expectations of a considerable accession of fortune from several relations; and that the said *Peter Holford* not being then in the actual possession of any estate out of which any provision might be made for the said *Constantia Wright*, it had been (amongst other things) agreed between the said *Peter Holford* and her, the said *Constantia Wright*, that all such estates, either real or personal, or of any kind whatsoever, which should or might descend or come to her during her coverture, or to the said *Peter Holford* in her right by descent, or by virtue of any remainder or reversion, or of any devise, gift or bequest, or by virtue of the

statute of distributions, or by any other means whatsoever, should likewise be and enure to the said *Constantia Wright* for her sole and separate use, free from the control of the said *Peter Holford*, and no ways subject to his debts, and to be applied and disposed of, from time to time, as she should by any deed or deeds executed in her lifetime, or by her last will and testament, duly made and published in the presence of three or more credible witnesses, direct or appoint, notwithstanding her coverture. It was witnessed, that in consideration of the said intended marriage, and for better establishing and confirming the said agreement, he, the said *Peter Holford*, covenanted and agreed with the said *Sir Edward Smith* and *Thomas Bramston*, that he, the said *Peter Holford*, would, as soon as might be, at the request of the said *Sir Edward Smith*, *Thomas Bramston* and the said *Constantia Wright*, execute and perfect all deeds, acts, matters and things, conveyances and assurances as should be devised or advised by her counsel, from time to time, as often as any estate, real or personal, should descend upon or come to the said *Constantia Wright*, or to the said *Peter Holford* in her right, by descent, devise, bequest or gift, or by virtue of any reversion or remainder then already limited, or afterwards to be limited, or by virtue of the statute of distributions, or by any other means whatsoever, would execute and perfect such deeds, acts, conveyances and assurances in manner aforesaid, for vesting the same in such persons as she should appoint, in trust, for her sole and separate use, and to be subject to such dispositions as the said *Constantia Wright* should, from time to time, and at all times thereafter, make thereof, by any deed or deeds, writing or writings, under her hand and seal, or by her last will and testament, duly made and published in the presence of three or more credible witnesses ; and that until the said *Peter*

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*Holford* should convey and assign the premises in manner therein above mentioned, that it should be lawful for the said Sir *Edward Smith* and *Thomas Bramston*, and the survivor of them, or his executors, administrators, or assigns, to receive the rents and profits of all such lands as might or should descend upon or come to the said *Constantia Wright* as above mentioned, during the said intended coverture, and also all such personal estate as aforesaid, and pay the same to her, or as she should appoint, for her separate use, and subject to the like dispositions of the said *Constantia Wright*, notwithstanding her coverture.

On the 21st of *April*, 1758, *William Smith* died unmarried, and without issue, whereupon Mrs. *Holford* and her sister became entitled, in fee simple in possession, to all the estates of Mr. *Carrington*, in equal undivided moieties, subject to the trusts of the will.

Mrs. *Holford* by her will, dated the 13th of *May*, 1758, after reciting the said articles, and that she was entitled to one undivided moiety of the unsold estates of her brother, Mr. *Carrington*, by virtue of the power reserved to her by the said articles, and all other powers enabling her in that behalf, did limit, appoint, give, and devise all her undivided moiety of the said premises, to certain trustees, to the use of her husband, the defendant, *Peter Holford*, for life; remainder to trustees for five hundred years, to raise portions for the younger children by the said *Peter Holford*; remainder to her first and other sons by the said *Peter Holford*, in tail male; remainder to all and every her daughters by the said *Peter Holford*, in tail general, as tenants in common, and for default of such issue, to her own right heirs.

Mrs. *Holford* died on the 17th of *July*, 1758, leaving the plaintiff and a daughter by her first husband, and

two daughters by the defendant, *Peter Holford, Catharine Maria*, and *Constantia Maria*: the latter survived her mother but a short time, and died unmarried and a minor.

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*Catharine Carrington*, the other sister of the testator, by indentures of lease and release dated the 1st and 2d of *June*, 1759, conveyed all her moiety of the said estate to such uses as the plaintiff should appoint; and in default of such appointment, to the heirs of his body; with provision in the same indenture for raising the sum of £6,300 for the benefit of her niece, *Catharine Maria Holford*, in case it should be judicially determined that she was not entitled to her mother's undivided moiety of the said estate, under her mother's will.

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The plaintiff filed his bill in *September*, 1760, to carry into effect the trusts of *Mr. Carrington's* will, and for an account, &c., and that the trustees might convey the said estate, as to one moiety, to the plaintiff and his heirs, and as to the other moiety, to the uses, &c. limited by the indentures of the 1st and 2d of *June*, 1759, &c. A cross bill was filed by the trustees for a general account and directions.

Three questions were made; two between the plaintiff *Wright* and the *Holfords*, and one between *Wright* and *Sir Henry Englefield*. 1st. As to the validity of the appointment contained in *Mrs. Holford's* will. 2dly. In case such appointment was good, whether *Miss Holford* was entitled to the whole of the estate by way of cross remainder, or whether the moiety of *Constantia Maria*, her younger sister, did not go to the plaintiff as heir at law to his mother. 3dly. Whether *Sir Henry Englefield* was entitled to the additional annuity of £100 under the codicil.

*Mr. Yorke*, *Mr. de Grey*, and *Mr. Madocks*, for the plaintiff.



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1st. As to the validity of the appointment under the power. The only method of enabling a feme-covert to dispose of her inheritance by deed or will operating as an appointment, are either by a conveyance to uses or trusts, before marriage, reserving such power; or else by fine, in which the wife and husband join after the marriage, with a deed to lead the uses, reserving such power. *Per* Lord *Hardwicke* in *Peacock v. Monk* (a). But without one of these two modes her will of real estate would be ineffectual against her heir at law. In that case his lordship stated a doubt very strongly, that a feme-covert could not dispose of her estate so as to bar her heir, by a bare agreement. So in 7 *E. 4.* fol. 14. The wife being *cestuy que* trust, she and her husband sold the land, and he received the money, and they both required the feoffee to make estate to the vendee, yet after the husband's death she was relieved against the feoffee. His lordship there thought that it was necessary that she must do something to alter the nature of the estate. In *Thayer v. Gould* (b), it was said by Lord *Hardwicke*, that a feme-covert could not convey an equitable estate unless examined by the court. Though marriage articles, from the consideration which pervades them, will bind the husband to do all acts to enable his wife to make a disposition of his estate; yet in case of those acts not having been done, the heir will be entitled to take advantage of the non-performance of them.

In the present case the power rested only upon articles; there was no estate vested in trustees, out of which an appointment by virtue of the power was to enure. The issue of the second marriage cannot be aided as purchasers, for the power was given to enable Mrs. *Holford* to dispose of her lands by deed or will, and there-

(a) 2 *Ves.* 191.

(b) 1 *Atk.* 615.

fore the issue of the marriage were not exclusively the object of the power. The case of *Bramhall v. Hall* (a), was much stronger, as there the wife had the legal estate, but the court refused to interfere, on the ground of the want of consideration. It is also clear that this appointment cannot take effect as a declaration of trust. The declaration of trust must be contained in the same deed which creates the trust; which is the same rule as was formerly held with respect to uses. The case of *Hearle v. Greenbank* (b), shews how strict the court is in the construction of these sort of powers.

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2dly. As to the question of the cross remainder, the intent of the will is express, that the daughters should take severally, and not jointly, viz. distinct moieties, as tenants in common. The words *such issue*, must be construed the issue of such tenants in common, respectively; the words heirs of the body, in the will, being words of limitation, and not of purchase, upon the death of *Constantia*, the remainder in fee of her moiety vested in the plaintiff. They cited *Comber v. Hill*, *Stra.* 969; *Williams v. Brown*, *ib.* 996; and *Davenport v. Oldis* (c).

3dly. The additional annuity is given only out of the real estate; the words of the will are, one rent-charge of £200 clear, with power of distress and entry. The codicil gives an additional sum of £100, payable as mentioned in the will. This is an increase of the testator's former bounty. The expression implies that the fund for the £100 annuity should be the same as that for the £200, both to issue out of the real estate. These are clearly words of reference, and bring it under the statute of frauds.

(a) *Ante*, p. 220.

(b) 3 *Atk.* 695. 1 *Ves.* 298.

(c) 1 *Atk.* 578.

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The *Attorney-General* and Mr. *Wedderburne* for Sir *Henry Englefield*, upon the third point, were stopped by the court.

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[ 248 ] These gifts are several and distinct. The implication contended for is unnecessary and groundless. There is a wide distinction between expressions which form part of the substance, and those which only affix an accidental circumstance to it. The words *payable as mentioned in my will*, mean no more than to describe the time, mode, and place of payment, &c. They cannot apply to the fund.

Mr. *Willes* and Mr. *Sayer* for the *Holfords*.

Mrs. *Holford* being a feme-sole at the time of the execution of the marriage articles, and entitled to the trust of the reversion in fee of a moiety of her brother's estate, had it in her power to charge and alienate it as she pleased: in this situation she executes the marriage articles. It is admitted that if the estate had been conveyed to her previous to her marriage, and vested in trustees to such uses as she should appoint, that any appointment by her would have been valid; *Rich v. Beaumont*, 1727; *Shardlow v. Taylor*, 3 Salk. 113; but it was not in her power to do this. The legal estate was outstanding, and no formal conveyance could affect it. Such a conveyance could only amount to a direction to trustees; and as Mrs. *Holford's* interest was only equitable, the general intention expressed in the articles is as binding as an equitable conveyance. In *Churchill v. Dibben* (a), Lord *Hardwicke* held, that a will by a feme-covert, who has a power to devise, must be considered as made in execution of that power, in order to

(a) *Vide cit. post.*

effectuate the intent. *Hearle v. Greenbanke* was decided solely upon the infancy of the feme-covert.

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As to the question respecting the cross remainders ; if there had been but one daughter, she would clearly have taken the whole estate in exclusion of the heir at law. The words "in default of such issue," can only be applied as relative to the issue of all and every daughter. It is observable too that the word *respective* has been omitted, which if the testatrix had intended to deprive a surviving daughter of the share of her sister dying without issue, would have been inserted. Lord *Hardwicke* laid great stress upon that circumstance in *Davenport v. Oldis (a)*.

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*The Lord CHANCELLOR.*

(After stating the prayers of the two bills.) Upon this 14th November original bill three questions have been made for the consideration of the court, and they have, from the interruption of accidents and other circumstances, taken up three several days in the discussion of them.

The first question which was made, was a question between the plaintiff, Mr. *Wright*, and Miss *Holford*, whether she, by virtue of the articles executed upon the marriage of her mother, and a will operating as an appointment consequential to those articles, be entitled to take Mrs. *Holford's*, her mother's, moiety of the reversion of Mr. *Carrington's* estate? The next question is, If she does not take the whole moiety, and yet takes at all, whether she shall be entitled under that appointment to

(a) Lord *Kenyon*, in *Watson v. Foxon*, cit. *post.* observed, that it was unworthy Lord *Hardwicke's* great learning and ability to lay such stress on the word *respective*. Creating a tenancy in common, divided the title as much, whether the word *respective* was used or not.

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one quarter or half of a moiety, and not to the whole moiety? for that the residue would go by virtue of the limitation in the will of Mr. *Wright*, and would not attach by way of cross remainder upon Miss *Holford's* moiety. The third question is, Whether Sir *Henry Englefield* is entitled to an additional annuity under the codicil; or whether that annuity, by its being directed to come out of the real estate, or intended or meant so to be; and the codicil, not being executed according to the statute of frauds, should cease, and not take place, to be paid out of the personal estate, upon which it is a charge, because the intent was to fix it upon the real estate.

As to the second and third questions, they do not admit of my saying more upon them, than that I am clear that Sir *Henry Englefield* is entitled to his annuity out of the personal estate; and that Miss *Holford*, if entitled at all, is entitled to her mother's whole moiety, and that the plaintiff's reversion is not to take place till default of issue in every one of the daughters of Mrs. *Holford* (a).

(a) There was a case, afterwards directed for the opinion of the court of *King's Bench*, upon this point, *Wright v. Holford*, *Comp.* 31. The court certified, that "as nothing was given to the heir at law whilst any of the daughters, or their issue, continued, they must amongst themselves take cross remainders." This opinion was followed in *Phiphard v. Mansfield*, *ib.* 797. and *Watson v. Foxon*, 2 *East*, 36. The rule laid down in those and the following cases is, that where cross remainders are to be raised by implication between two and no more, the presumption is in favour of cross remainders; where they are to be raised between more than two, the presumption is against them: that 'presumption, however, may be rebutted by circumstances of manifest intention to be collected from the whole will taken together. *Perry v. White*, *Comp.* 777. *Atherton v. Pye*, 4 *T. R.* 710. *Roe v.*

The only remaining question then is the first question I stated, Whether Miss *Holford*, by virtue of the articles and will of her mother, shall take this one moiety; or whether these articles and the consequential appointment are void?

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The point, therefore, for my present consideration depends upon the particular state of the situation of Mrs. *Wright* at the time of her marriage to Mr. *Holford*, which was this. She was at that time entitled to a moiety of the reversion in fee of Mr. *Carrington's* estate. Her sister was entitled to the other, who has conveyed that, subject to certain conditions, to the plaintiff, Mr. *Wright*. Mrs. *Holford* was entitled in fee to one moiety; not to the legal estate: but she was entitled as *cestuy que trust*; the whole estate being by the will limited to Lord *Cadogan* and Sir *Henry Englefield* (and another who is since dead). Therefore the legal estate of the reversion in fee subsisted in them at the time she executed the articles in 1755. The substance of the articles is this. (Here his Lordship stated the articles.)

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This deed being executed in the situation she stood of *cestuy que trust* of a reversion in fee, she makes an appointment consequential to it. This is dated the 13th of May, 1758. It was done by way of will, reciting the articles that were entered into, and reciting her right under the settlement and will of Mr. *Carrington* to this reversion in fee. It goes on, "Now therefore my mind is," &c. (Here his Lordship stated the appointment.)

The question that is made arises out of these articles and this instrument, the situation of Mrs. *Wright's* interest at the time of executing those articles, and the intent which she had in executing them.

*Clayton*, 6 East, 628. *Doe v. ton v. Roc*, 1 Dow. P. C. *Webb*, 1 Taunt. 234. *Staun-* 384.  
*ton v. Peck*, 2 Cox, 8. *Clay-*

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She had several children, but only one daughter at present surviving by Mr. *Holford*. This daughter will, I think, be entitled to the whole benefit, when I come to consider the known principles of law, and the fixed rules of this court; not as confirmed by the single determination of a solitary case, but by the general recognition in the practice of the court, in which these principles have been admitted and never controverted. When I apply those principles to this particular case, and consider and answer those distinctions that have been attempted to be introduced to vary it from the general principle, I am of opinion that this is a good reservation of the dominion of the estate (which was an equitable estate in Mrs. *Holford*), by virtue of these articles antecedent to her marriage. I also think that the power in this will is well executed in the nature of an appointment, and that the limitation of the reversion being postponed to all the issue of Mrs. *Holford*, this makes a cross remainder to the daughter, and that she, subject to her father's estate for life, is entitled to one moiety, Mr. *Wright* being entitled to the other.

It has been throughout the case admitted that a woman may now antecedent to her marriage retain a power over a legal estate of which she is seised, so as to have during the coverture a power to dispose of it (which is done by complying with the requisites,) in the same manner as she might have done if she had not put herself under coverture. It is a common caution and provision that accompanies all settlements where the woman is seised of real property of great extent, in proportion to that which moves from the side of the husband. There are numbers of cases with regard to legal estates, which are much stronger than any cases in equity, which prove that a woman seised of a legal estate may dispose of it even where her power of disposition has not been executed according to the forms of law; yet this court will interpose

in such cases, and supply any defect in the legal conveyance on behalf of a person that has a meritorious consideration. And therefore the case of *Churchill v. Dibben (a)*, 22d February, 1754, was very properly cited by Mr. *Sayer* as an authority to this point. That case was as follows: Mrs. *Browne*, a woman seised of a real estate, had before marriage conveyed it to trustees to such uses as she by deed or will during her coverture should dispose of or limit the same. She afterwards devised the estate without taking any notice of the power. A variety of questions arose in the cause, which came before Lord *Hardwicke*, particularly with regard to the quality of the estate devised; whether, from the words of the particular devise, the devisee took only the freehold estate, or whether he took the freehold and leasehold too. Another question was, how far after-purchased lands which were purchased during the coverture could pass. There was no ground, however, laid for any objection to the fixed determination in equity, that a woman may reserve a power before marriage, and may dispose of her separate estate during her coverture; and in case she makes such a disposition, if the forms have been complied with, it is at once effectual. If it is defective in respect of them, the court can and will interpose to effectuate it against the heir at law, upon the consideration of a meritorious quality in the person who is to take under the appointment. Without it the court will not. This has been the established doctrine espoused and adopted by the court, after having been controverted for a great length of time.

In *Cannel v. Buckle*, 1 *P. Wms.* 243. a feme covert gave a bond to her intended husband, that in case the marriage took effect she would convey the lands to him in fee. The wife died without issue. The bond,

(a) Cit. *Sugd.* on Pow. 150 & 276, n. from *Reg Lib. A.* 1753, fol. 252.

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though void in law, was good evidence of an agreement in equity. The heirs of the husband shall there compel a specific performance of it. This was a bond given by the wife, which was void by the marriage: the objection was taken that the bond was rescinded. So here the objection is, that the agreement was only on the part of Mr. *Holford*; whereas it is expressly recited that it was agreed between him and his wife. The articles are so. But in the case cited Lord *Chancellor* in answer to all the objections said, that the impropriety of the security, that is, the taking a bond from a woman who meant to marry the obligee, or the inaccurate manner of wording such bond, are not material. It is sufficient that the bond is written evidence of an agreement that the woman in consideration of the marriage agrees that the man shall have the lands as her portion. This agreement being upon a valuable consideration shall be executed in a court of equity. In regard to the bond being extinguished, which it was at law, the court said it was unreasonable that the marriage upon which the bond was to take effect should be the destruction of it. It was objected that at law the wife cannot sue the husband, but in answer to that it was said, that in equity the husband could sue the wife, and the wife could sue the husband. The husband might sue the wife in the principal case. An objection was made that the covenant could not bear damages at law; the court gave an answer to that, viz. that it was not an universal rule that a specific performance could not be had in this court where damages could not be had at law.

In that case the principles were laid down much stronger than is contended for by Mrs. *Holford's* daughter in the present case; because that was the case of an actual bond given, not indicating that there should be any power reserved, but that it should remain upon an executory agreement to be completed at a future time. The court considered that bond as putting a trust upon her. The

act was done while she was sole and separate, and all her heirs were in herself. She had a right to bind them discretionary and arbitrarily as she might think proper. There was relief given in that case.

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In this case there is a lady seised of a reversion subject to a multifarious complicated trust. This dry reversion was at that time vested in her as a trust; she meaning to make a provision for her own power over the reversion when it shall come to be fruitful, notwithstanding the coverture she is about to enter into. It is agreed that it was possible for her to dispose of this in the manner she has meant to dispose of it. But it is said that it ought to have been done by virtue of new modelling the inheritance (whether it was legal or equitable) which she had. The answer, however, to that is, that she had no legal estate, therefore she could grant none. She could not convey the legal estate *de novo* by way of making new trustees, because they would be seised of nothing; there was nothing for them to be seised of. Lord Cadogan and Sir Henry Englefield would still have stood seised; consequently if she had granted the reversion to Smith and Bramston and their heirs, to the use of them and their heirs, for the uses and purposes mentioned in these articles, it would not have operated any otherwise than by declaring the trust of the estate in Lord Cadogan and Sir Henry Englefield.

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The law lays it down as a maxim, and it is a wise one, never to require things to be done *per plura* which may be done *per pauciora*: so it is with regard to the mode of conveying of persons seised of land. They may pass their estates under the most simple and plain titles that can be.

What has the lady done in this case? She has entered into these articles, and agreed that these estates shall go to certain uses. It is agreed that when they come into

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possession they may go to the uses which are mentioned in these articles, which are to her separate use, and subject to her appointment. Then she has declared that the trust which resulted to her by virtue of the deeds and the will of Mr. *Carrington*, which was lodged in Lord *Cadogan* and Sir *Henry Englefield*, shall be new modelled for her benefit on a new marriage. The court will not bind the trustees to act in that trust. They will only put it into other hands. But they are obliged from the minute this declaration was made to stand seised to the new equitable intents and purposes that Mrs. *Holford* has thought fit to impose upon them, by the new-modelling her estate for the benefit of herself and family.

It was said that it was a rule at law, and likewise a rule in equity, that trusts and uses must all spring out of one single and original deed, and therefore that the estate which created the resulting trust for the benefit of Mrs. *Wright* and her sister could not be controlled without new-modelling the estate by some future or distinct instrument, imposing new trusts and new uses upon that estate. But though that may be in some sense true, it is only true by way of subtilty, by technical reasoning, *secundum quid*, and not universally true.

Though a use or trust must arise out of the original feoffment to uses, yet they need not be specifically created at the time of the execution of the deed.

I agree to this, that every use or trust must be created at the time of the original feoffment to uses or trusts. But then it is not necessary that they should be specifically created, it is sufficient if they are so substantially and rationally in point of time; because they must all come out of the original feoffment in one way or other. As, 1st, upon a use. A man seised in fee conveys by way of feoffment or otherwise to *J. S.* and his heirs without consideration. The person who conveyed dies, having a son. The use which in that case resulted was before the statute what a trust is now: it was only executable in Chancery by a subpoena which resulted to the heir. The heir lives

fifty years, then leaves it to descend in the same way as it originally came to him. The feoffee when he pleases has nothing to do but personally to declare, "You, *J. S.* that stood seised to my use, must now stand seised to the use of *J. N.* and his heirs." *J. N.* becomes entitled to an equitable estate, yet the man who originally had no interest in the use by operation of law shall take the trust under the original feoffment. So far Mr. *Yorke's* argument was right.

But with regard to the specification of uses, the alteration and new modelling of uses, they may be all, and they frequently are all created subsequent to the original estate which is to support them, and at common law they were created, governed, and directed by the intent of the owner of them; there was nothing else wanting; therefore parol declarations, parol creations, and parol alterations of uses were to all intents and purposes as effectual as any other mode whatsoever of charging estates (*a*).

Whatever alteration may have taken place in the law with respect to the conveyance of uses from that time to the present, there has been none in the control of them. The governor of the use is now, as it was then, the absolute will and declared intent of the owner. So far it is the same as it was anciently. For public convenience, indeed, the wisdom of the legislature has imposed a mode and form of solemnity to be used in declaring such intention; but the intention is still left as the guide to direct and control the use. The sole reason of instituting that solemnity was because experience had shewn that the wickedness of mankind was so great, and had introduced such fraud and perjury, that men set up fictitious

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The statute of frauds has only imposed a form in declaring the use, the control of the use remains as it was before the statute, the absolute will and declared intent of the owner.

(a) *Vide Shepherd's Touchstone*, 519. *Sanders* on Uses, 172, *et seq.*

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instruments, not executed with due solemnity, to the destruction of estates, and the prejudice of families (a).

Now that being the case with respect to uses, the operation must be similar with respect to trusts. There is no rule so certain, so general, and so strongly adhered to by the ablest judges that have sat here as this, to observe *in omnibus* the rules of law with respect to the regulation of property. They have been always strictly observed as principles in a court of equity.

Here then is antecedent to the marriage a declaration of the trust by the lady of this estate, which I apply in my reasoning and judgment as a declaration of trust made to Lord *Cadogan* and Sir *Henry Englefield*, though they are not named. In her articles she new-models the trust. She became seised of these new trusts instead of the old resulting trusts she had before.

When this transaction is considered in that light, it seems to bring it to the common case of a woman doing this merely with a view of putting herself, as to her estate, in a separate condition after coverture, and to be just the same as if she had had a legal estate. In that case she might have new-modelled the estate, and put it upon new trusts to be created.

It is a wise principle, and fixed now, contrary to the illiberality that prevailed in ancient times, when with subtilty, narrow reasoning, and technical prejudice, they required the nicest exactness and scrupulous forms in carrying people's intentions into execution. Therefore there was nothing more certain even before *Charles* the

(a) As to the operation of this section of the statute of frauds (the 7th) and the 4 *Ann*, c. 16. as to the declaration of the uses, of fines, and recoveries, *vide Sanders* on Uses, 187, *et seq.* *Sugd. Gilb.* on Uses, 111.

Second's time, than if a person had several ways of conveying an estate (as this lady has done, "by virtue of all other powers me thereto enabling"), if the person did it by warranty intending to pass it by transmutation of possession, yet the judges having more consideration to the substance, viz. *the passing the estate*, than the form, viz. *the manner of passing*, would permit it to pass as a covenant to stand seised. A number of cases have now said where the intention was to pass it at all, the judges are *astuti* to find it sufficient, and if there is no transmutation, it is a covenant to stand seised. "We will look to the substance, not the shadow" (a).

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It is upon these principles that in this case, and others similar, the court has gone in the control of these kind of powers over estates during coverture, and these stipulations which a woman makes while she is free in order to guard against her husband. It is upon these principles that the court has interposed in cases where the conveyance was intended to be a legal conveyance in those cases I mentioned, and in several others. The last was one that came before me (b). There on the discussion of the point by counsel it all centered in this. It could not be questioned, but let this be intended to be a legal conveyance of a legal estate and defective, the court would never interpose against the heir for a mere volunteer, and that the court had constantly interfered in the case of a meritorious consideration. It was upon that principle that I determined: there was no consideration. But in this case, supposing it a case upon a defective execution of a power, there is a good consideration. The provision made by Mrs. *Holford* for her children is a meritorious and

(a) See the observations of (b) *Bramhall v. Hall*, ante, *Wilson, J.*, in *Habergham v. Vincent*, 2 Ves. jun. 226. p. 220.

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valuable consideration. It is *debitum naturæ* which she recognizes and is paying. There is not a case where it has not been held to be a valuable consideration.

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In that case which I mentioned of *Churchill v. Dibben* Lord *Hardwicke* took up the consideration of what had been thrown out with regard to the mode by which a woman might dispose of a real estate after she was married. Lord *Hardwicke* does not lay it down that it must be done by an original act wherein new trustees must be appointed in all cases where a new declaration of uses is to be made: what he says in relation to the husband is certainly true upon a supposition of its being given to the wife, though not stipulated for before; in that case it might bind the husband, but could not bind the heir, who was no party to it.

I therefore am to consider this case in all these situations. I cannot but think it a common case. A lady makes a declaration of trust at the time she had a power to vary and new-model it, and there are proper trustees to carry it into execution. With regard to the moiety to be conveyed to the daughter, it will be an estate tail general; and when she is enabled to suffer a recovery she will have a fee. This is my opinion upon the several points which were agitated and left to my determination.

The decree accordingly, after ordering the usual accounts, directed an allowance to be made to Sir *Henry* in respect of the account of £100, and a sufficient part of the personal estate to be set apart to answer the growing payments of it. It was also declared that the articles and subsequent appointment were a good and valid appointment of one moiety of the estate, &c.

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This decree was afterwards *House of Lords*, (1 Bro. P. affirmed upon appeal to the C. Ed. Toml. 486.) where the

point, as observed by Lord Kenyon in *Doe v. Staple*, 2 T. R. 695, was very ably discussed on the doubt which Lord Hardwicke had thrown out in *Peacock v. Monk*, though his doubts were not sufficient to induce the House to determine against the agreement.

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DESTOUCHES v. WALKER.

(Reg. Lib. A. 1764. fol. 21.)

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ANNE JOHNSTON by her will, bearing date the 12th of May, 1734, gave all the money she had, whether in the public funds of *England* or *France*, to *Charles Hedges*, alias *Lacey*; but in case he should die without issue, then all the said effects to be equally divided amongst such of her nearest relations which should at that time be living, whether in *England* or *France*, upon condition that the said *Charles Hedges*, alias *Lacey*, or her said relations after him, should pay to her servant, *Ann Powell*, an annuity of £20 for life.

Bequest of money to *A.* upon condition that he should pay an annuity to *B.* and in case *B.* should die without issue, then to be equally divided amongst such of testatrix's nearest relations which should at that time be living: held, the bequest over was too remote.

*Charles Hedges* survived the testatrix, and died November, 1756, without having ever had any children, and made the defendants his executors. The plaintiffs were the nearest relations of the testatrix living at *Charles Hedges*'s death, and filed this bill to have the stocks transferred to them.

Mr. *Sewell* and Mr. *Harvey* for the plaintiffs.

The case of *Pinbury v. Elkins*, 1 P. W. 563, must govern the present. The words there were, "provided if she shall die without issue by the said testator, then after her decease £80 shall remain to the testator's brother." That was held good, as meaning a dying without issue living at the party's death. The words in the present



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case are as strongly indicative of such intention. "At that time", and the immediate connexion between *Charles Hedges* and the relations in the charge of the annuity by \*the words "after him", without mentioning the issue, shew that the testatrix intended to give the stocks over, not upon a general failure of issue, but upon *Charles Hedges's* dying without leaving issue living at the time of his death.

Mr. *Yorke* and Mr. *Perryn* for the defendants.

*The Lord CHANCELLOR.*

I think this devise over is void, as being too remote. One known rule of construction is, so to construe the devise over as not to hurt or lessen the interest of the first taker; and not to lessen either the interest or power of the first in order to establish the devise to the second taker. Now by construing these words as relating to issue living at the death of *Charles Hedges*, all power of providing for any issue he might have in his lifetime, by applying any part of the bequest to putting his children out apprentice, or to set them up in the world, would be taken away from him. This is a benefit which the testatrix could never intend to deprive him of. She intended to do more than the law would allow her to do, that is, to give the stocks to *Charles Hedges* and his issue generally, and after a general failure of issue to give it over.

Bill dismissed.

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See the case of *Bodens v. Lord Galway*, *post.* 297, and the cases in the note to it.

JACKSON v. HURLOCK.

(Reg Lib. A. 1764. fol. 63.)

24th July, 8th &  
26th Nov.

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Sewell, MSS.

SIR JOHN HARTOPP having two daughters, the defendants, *Sarah Hurlock* and *Elizabeth Dallow*, by his will, bearing date the 9th of *July*, 1759, gave his manors and estate of *Barton Laxors*, in the county of *Leicester*, to *John Spranger* and his heirs, in trust for *Sarah Marsh* (who was his housekeeper), for life; with remainder to the defendant, *Sarah Hurlock*, for life, for her separate use; with remainder to her first and other daughters in tail; with remainder to her first and other sons in tail; with remainder to his other daughter, *Elizabeth Dallow*, and her children, in like manner; with remainder to his own right heirs. He also devised his manors of *Brettingby* and *Wyverly*, and his estate in *Trethby* (subject to an annuity), to his said daughters and their children in the same manner; with remainder to his own right heirs. He also devised to *Sarah Marsh* and her heirs for ever, all his manors of *Buckminster* and *Sewster*, subject to, and charged with payment of any sum not exceeding £10,000, to such persons, and at such times, and in such proportions as he by a letter, or other note, memorandum or writing, under his hand, to be delivered to, or left with her, should appoint; not doubting or distrusting her honour or integrity in the performance of his will, and intention therein. And he directed that all such money as should be owing by him to her,

Testator devises real and personal estate to certain uses, and afterwards by deed conveys it to the same uses until marriage, and then to newuses; providing for his intended wife, and the issue of the marriage: after the deed, and before marriage, by codicil attested by three witnesses, and directed to be annexed to his will, he imposes a forfeiture in case of his wife being disturbed; and after the codicil marries: held, that the settlement revokes the will, which is republished by the codicil; that the new uses springing on the marriage do not revoke the codicil, nor the marriage, as being contemplated by the will.

Where lands were devised, subject to, and charged with a sum not exceeding 10,000*l.* which testator afterwards directed to be paid to charities; held, that the charge sunk for the benefit of the devisee.

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or any other at his death, and also his legacies therein bequeathed, and writ with his own hand (to the amount of about £1230), should be charged on the said premises, the inheritance whereof was devised to the said *Sarah Marsh*, and made the said *Sarah Marsh* residuary legatee and sole executrix.

He afterwards having an intention of marrying *Sarah Marsh*, made a settlement of 10th of *October*, 1760, and conveyed the above estates, until the marriage, to such uses as the same were before settled and conveyed, and afterwards to the use of himself and wife, and issue of the marriage; with remainder to such uses as he should by deed or will appoint; remainder to his own right heirs.

On the 30th of *October*, 1760, he made a codicil to his will, attested by three witnesses, and which was intitled "A codicil, which I direct and desire to be annexed, and taken, and considered as part of my last will"; and then disposed of certain monies in the public funds, which he recited to have discovered since the making his will, and then directed that if either of his daughters, or their husbands, or any other to whom any devise or legacy by his will should come, should disturb, or attempt to disturb his wife, they should forfeit their interest under the will, and the same should go to *Sarah Marsh*.

Upon the 1st *November*, 1760, he wrote a letter or memorandum directed to *Sarah Marsh*, whereby, after reciting the devise to her of the manors of *Buckminster* and *Sewster* in the words of the will, in pursuance of his said power, and in confidence of the trust he reposed in her by his said will, he declared it is his will and mind, and desired her, either by sale or mortgage, or otherwise, as to her should seem meet and convenient, to raise so much money as would be sufficient to discharge not only his just debts and legacies bequeathed in his will, and

charged upon his said estate, but also the several sums following, to the several persons, and for the several uses in the manner thereafter mentioned. Then he gave several sums to charitable and superstitious uses to the amount of about £6000.

Upon the 4th *November*, 1760, he married *Sarah Marsh*; and on the 15th *January*, 1762, died, leaving *Sarah*, his widow, and *Sarah Hurlock* and *Elisabeth Dallow* his only children and heirs at law.

Upon the 18th *April*, 1763, dame *Sarah* made her will, and reciting that she had contracted with Lord *William Manners* for the sale of *Buckminster* and *Sewster*, devised those estates to the plaintiffs, her sisters, in trust, to complete the said contract, or to sell the premises to some other person; and directed that the purchase money should be first applied in discharge of the money to which the premises were subject by Sir *John's* will, and that the residue should be considered as part of her personal estate, and made the plaintiffs residuary legatees and executrixes.

This was a bill to have Sir *John's* will and codicil, and the will of dame *Sarah* established, and for directions for carrying the trusts into execution: that the estates of *Buckminster* and *Sewster* might be sold for payment of Sir *John's* debts, and such of the legacies as were not void; and to have the residue of the purchase money discharged from the charity and superstitious legacies.

Mr. *Yorke* and Mr. *Hoskins* for the plaintiffs.

Four questions arise upon the present case. The first is, Whether the will was revoked by the subsequent settlement? If it were precisely the same as Lord *Lincoln's* case (a), it would be improper to argue it; but in that the revocation was considered as caused by the alteration

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(a) 1 Eq. Ab. 410.

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of the legal estate ; in the present case the legal estate has been out by the will, and only waited for his appointment : \* the settlement has had no effect upon the legal estate. The second question is, Whether, supposing the will to be revoked, the codicil has not set it up again ? The favour always shewn to the intention of testators entitles this codicil to be considered as a republication ; it is expressly directed to be taken as part of, and annexed to the testator's will. It relates to his real estates, and is attested by three witnesses ; it prohibits his daughters from defeating any of the devises in the will, and gives force to the will so as to pass all the interest in his estates. The insertion of new uses in the settlement makes no objection ; for it takes effect and operation from the time of its execution, and not from the time of their introduction. There was no time at which the testator was not possessed of a contingent fee.

The third question is, Whether the marriage is a revocation of the will and codicil ? Marriage alone is never considered a revocation of a will of personal property, and is of no effect unless accompanied with the birth of a child : this is borrowed from the civil law. *Just. lib. 2. tit. 13. Posthumi quoque liberi vel hæredes institui debent vel exhæredari : et in eo par omnium conditio est ; quod et filio posthumo et quolibet ex cæteris liberis sive fæminini sexus sive masculini præterito valet quidem testamentum ; sed postea agnatione posthumi sive posthumæ, rumpitur, et eâ ratione totum infirmatur.* In *Domat* it is said that a testament is annulled by the birth of a child, though the testator might declare against it : he declared against it. There have been several cases in the Spiritual Court where wills have been considered as revoked ; but in every one of them there have been the joint circumstances of marriage and birth of a child. *Burrow v. Baguel, 1695. Meredith v. Meredith, 1713.*

*Outram v. Outram*, 1738. *Barker v. Pusey*, 23d May, 1749. *Jekyl v. Bradyl*, 1755. *Wells v. Wilson*, at the Cockpit, November, 1756. *Eyre v. Eyre*, cited 1 P. Wms. 304. The case which approaches nearest to the present is one of *Altham v. Grey* at the Cockpit; for there, as in the present, a provision was made for the children by settlement; and it was held that the will was not revoked even by marriage and having children, for that the presumption of revocation was repelled by the provision. *Overbury v. Overbury*, 2 Show. 214. All these cases apply merely to personal estate: it has never yet been decided, since the Statute of Frauds, that marriage, even with a child, has been a revocation; and in *Brown v. Thompson*, 2 Eq. Ab. 413, Lord Keeper *Wright* held, that it was no revocation.

The fourth question is, Whether the void legacies shall go to the heirs at law as a resulting trust, or sink into the estate for the benefit of the devisee? This is not a devise on trust. The estate was devised, charged with the payment of the legacies; and as they cannot take place, the devisee is entitled to have the estate discharged of them.

The *Solicitor-General* and Mr. *Ambler* for the defendants.

This will is so clearly revoked by the settlement, that we shall confine ourselves to three points. The first is, Whether this codicil is a republication of the will? and it is clear that it is not. The testator having acquired a determinable fee, the codicil meant only to set up the will, *quoad* that interest; the contingent fee, to take place after the marriage and the limitations spent, was not intended to pass by it, and could not pass. Upon the marriage he was in of a new estate, and was no longer seised of the one which he had devised. The settlement took effect upon the introduction of the new uses, which was not till

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the marriage, and this being after the codicil, operated as a revocation of it. *Penphrase v. Lord Lansdowne*, *Vin. Ab. Dev. Z.* 22.

The next question is, as to the effect of the marriage in revoking the will and codicil? The passages cited out of the civil law authors do not apply, but fall under a different consideration; that is, the power of the father to disinherit his children without a reason, a power which the Roman law did not give him: there are, therefore, no authorities to show that the birth of a child is necessary to make marriage a revocation of a will. It seems to be generally agreed, that before the statute of frauds marriage was a revocation of a will of real as well as personal estate. There are no determinations, indeed, in the books, that marriage since the statute was a revocation, the question never having yet arisen; but there are a great number of cases which decide that a change of circumstances will operate to revoke a will. Most of the questions on this point are, whether the circumstances should be considered as a total or a partial revocation. 4 *Co.* 61. *Plowd.* 343. *Hall v. Dunch*, 1 *Vern.* 329. 2 *Show.* 242. In *Lugg v. Lugg*, *Salk.* 592, Lord C. J. *Treby* says, "There being such an alteration of his estate and circumstances, here was room and presumptive evidence to believe a revocation, and that the testator continued not of the same mind." There were children in that case, and therefore it is not an authority in point for the present; but it is very strong to show that a will may be revoked by the implication arising from a change of circumstances. The case of *Brown v. Thompson* does not at all negative the position that marriage alone may be a revocation of a will of land: it was considered so by the *Master of the Rolls*, and though the Lord Keeper varied the decree upon the particular circumstances of the case, yet he admitted the general principle. The wife's being

with child was not taken into consideration, and could not, for she was *privement enceinte*, and therefore no argument could be drawn from that circumstance to shew that the testator was not in the same mind. Lord *Keeper's* reasons are not quite conclusive. He says, "it is for the sake of the wife, as well as the children, that the rule must prevail. A wife is entitled to a provision as well as children; neither have any thing secure in the personal; and though the wife is entitled to dower in the real, yet if it be a trust estate she will be defeated, and most of the great estates are in trust." Now the wife might marry again, and either give the estate to her second husband, or to her children by him, or divide it between the two sets of children (a). In *Brown v. Thompson* it does not appear that the wife was otherwise provided for; here she is jointured. There is also another circumstance in this case which ought to incline the court to consider this a revocation, for in that case the children will take in the other strangers.

The fourth question is, whether the void legacies shall go to the heirs at law, or sink into the inheritance? The right of the heir is clear; if the devisee is not entitled, the legacies will be considered as so much of the estate not disposed of. The question, therefore, is, whether, in the event, they have or have not been disposed of, and that depends upon the construction of the will and letter. Nothing is intended to be given to the devisee but the residue, after debts and legacies taken out. The mode of expression is immaterial, *that* is substantially his intention. Suppose so much as would pay the debts and legacies had been directed to be sold, and the residue of

(a) Mr. Justice *Buller*, in given in this case for the *Doe v. Lancashire*, 5 T. R. judgment at the *Rolls* were 61, observed, that the reasons the most sound.

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the estate to go to the devisee, there could have been no doubt ; here the will is tantamount, and the letter is expressly so. The will devises the estate, subject and \*chargeable, not doubting, &c. The latter words amount to a trust ; the latter calls it a trust, and directs a sale or mortgage. It was argued that the estate was given charged, and therefore whatever was discharged, the devisee is entitled to the benefit of. But the answer to that is, that the devisee was to have only the residue. This is not like the case of portions under a settlement, there the estate is intended to be settled, subject to a contingent right to portions, and the issue are purchasers of the estate by the stipulation of the parties ; here there is an absolute devise to charities ; the charge does not depend upon the devise to the estate. As she was not entitled under the particular devise, so also was she not as residuary devisee ; she was residuary devisee of only part of the testator's estate. If she had been so of the whole, she could not have taken. The distinction between a lapsed devise of real and personal estate is, that the residuary legatee takes the latter, but not the former.

*The Lord CHANCELLOR.*

I am very clearly of opinion with the plaintiffs upon the 1st, 2d, and 4th questions, but the 3d question is new, and I should wish to consider of it. I mean to give no opinion at present ; but I always understood that marriage and the birth of a child would revoke a will of personal estate. There is, I believe, no determination that marriage by itself would do so. But as this is the case of land, I think it requires previous consideration. The cases which have been cited do not prove that marriage and the birth of a child will revoke a will of real estate. In all laws, indeed, a will may be revoked by circumstances. Captivity did so by the Roman law :

the *jus postliminium* restored it, or rather made it to be considered as if the testator had never been in captivity. \*Different circumstances prevail in different countries: the law in this country overrules the will by giving dower to the wife.

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*The Lord* CHANCELLOR.

(After stating the case.) Upon this case four questions 26th November. have been made. The first was, whether the will was revoked by the settlement. The proposition was so obvious that if a man aliens that which he intended to devise, this inconsistent act and inconsistent intent was a revocation, that it has been many and many years settled to be so in courts of law; and in Lord *Lincoln's* case (a) the only question was, whether this court would introduce new rules with respect to the limitation of equitable estates, which it wisely determined not to do; and the same determination was confirmed in the case of *Pollen v. Huband* (b). It is therefore quite clear that this lease and release is a revocation of the will.

The second question was, whether the codicil amounted to a republication of the will, and revived the disposition thereby made, so as to operate upon the reversion reserved to Sir *John* by the settlement. And I am of opinion that it did; the will being thereby referred to, and the testator having declared his intention that the codicil should be taken as part of the will, which necessarily implies that the will referred to must be taken as part of the codicil, and both together make one instrument; so that it is the same as if the words of the will were inserted in the codicil, for *res relata inesse videtur*. It appears from many cases, that before the statute of frauds, a will revoked

(a) 1 Eq. Ab. 410.

(b) 1 Eq. Ab. 412.

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was revived by a bare declaration of the testator's intent. A man seised devises, aliens, and by that revokes; \*repurchases, and afterwards, *aliquo modo*, shews his intent that the said will should be his will: this was considered a good republication, and such a declaration with delivery would pass after-purchased lands. For if the words of the first comprehend his whole will, to what end is he to indite *de novo*? It is sufficient if he declares his intent. If the law, indeed, for political reasons requires that intent to be evidenced under particular solemnities, those solemnities must be complied with. Since the statute of wills, the republication must be in writing; since the statute of frauds, the republication must be under the solemnities required by that act. Here it is so: and the codicil is declared to be a part of the will, and, *ex necessitate*, the will a part of the codicil. A distinction was aimed at, that the will passed one estate, and that the codicil must operate upon another. But that is a distinction without a difference; for the will had words to pass either, and applies according to the time of the republication. The objection proves too much, and therefore proves nothing; for it is an objection to all the cases respecting after-purchased lands, which are now completely settled. I am therefore of opinion that the codicil revived and republished the will.

The third question is, whether the marriage revoked the will and codicil? It would, on the one hand, be very dangerous to say that marriage simply revokes a will. It would, on the other hand, be as dangerous to say that no alteration of circumstances to a state inconsistent with the will should not revoke. If such a case were to come before me upon a legal interest I should put it into a proper way to be determined. I do not find that marriage simply was ever adjudged a revocation of a will of personal estate. There seems less reason why it should be a revo-

cation of a will of real estate, where the law settles a provision out of it upon the wife, which the husband has no \* control over in case she omit to do it for herself (a). I •

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(a) It was not till the case of *Christopher v. Christopher*, cit. *Burr*, 2171 n. &c. that it was decided that *marriage and the birth of a child* were a revocation of a will of land. This determination has been followed in *Spraage v. Stone*, *Amb.* 751, and afterwards by *Doe v. Lancashire*, 5 T. R. 49, in which it was extended to the birth of a posthumous child coupled with previous marriage. In the latter case the court viewed the principle as founded, not so much on an intention to alter the will implied from subsequent events, as on a tacit condition annexed to the will itself at the time of making it, that the party does not then intend that it should take effect if there should be *a total change in the situation of his family*. Such a change of circumstances, however, as to amount to a revocation will not be considered as having taken place where the testator appears to have contemplated a subsequent marriage, by making a provision by his

will for the future issue of it. *Brady v. Cubitt*, *Doug.* 31. *Kenebel v. Scrafton*, 2 *East*, 530. And as observed by Sir *W. Grant*, (1 *Ves.* and *B.* 397.) in all cases where wills of lands have been set aside upon this doctrine, the testator having no children at the time of making the will, has afterwards married and had an heir born to him. Thus where testator being married and having children, made his will, it was held that a second marriage and birth of children did not revoke the will. *Ex parte* the Earl of *Ilchester*, 7 *Ves.* 348. *Sheath v. York*, 1 *V.* and *B.* 390. So also where testator being married, died, leaving his wife *privement enceinte*: the birth of the posthumous child was held not to revoke a will made after marriage. *Doe v. Barford*, 4 *M. & S.* 10.

So in respect of personal estate, the birth of a posthumous child has been held not to revoke a will made after the testator's marriage.

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do not mean, however, to give any general opinion, but shall confine myself to this particular case, where a man

*Ward v. Phillips*, cit. 5 T. R. 51 n. Nor the mere birth of children subsequent to a will made after marriage. *Shepherd v. Shepherd*, 5 T. R. 51 n. So in the case of *Thompson v. Sheppard*, cit. *Amb.* 490. marg. and more fully reported 1 V. and B. 394 n. marriage and having children were held not to be a revocation of a will made by a widower, who by a former wife had children living at the time he made his will; and a like determination was made in the case of *Wright v. Netherwood*, 2 Salk. 593 n. Ed. *Evans*.

These last determinations have, however, been contradicted by a directly opposite decision upon similar facts, in the Ecclesiastical Court, in the above case of *Sheath v. York*, cit. 1 V. and B. 390. It is observable, too, that Lord *Alvanley* in *Gibbons v. Caunt*, 4 Ves. 849, upon the question whether where children having been born after the execution of the will, a subsequent marriage without children revoked it; though no decision was necessary

upon the point, yet expressed himself in terms strongly favourable to the implied revocation.

Since the first edition of these decisions it has been determined in a very luminous judgment of Sir *J. Nicholl*, that the birth of children, combined with other circumstances, will revoke the will of a married man. *Johnston v. Johnston*, 1 Phil. Eccles. Rep. 447. It appears from the doctrine as there laid down, that subsequent marriage is not an essential requisite from whence revocation is to be presumed, but that birth of children with particular circumstances may raise such a presumption.

In *Brady v. Cubitt*, cit. *sup.* extrinsic evidence was admitted to rebut the presumption arising in favour of a revocation, in consequence of marriage and the birth of a child; though the courts have since cautiously abstained from coming to any actual decision as to the admissibility of it, yet its admission in that case has been repeatedly disapproved of.

having made a settlement on his wife and children devises the reversion in fee totally, consistent with the change of his circumstances. In that case I see no grounds, principles, or authorities on which to deem this a revocation.

As to the last question, I am very clear that the void legacies sink into the estate for the benefit of the devisee. It was argued at the bar upon a mistake, as if the testator intended at all events to take £10,000 out of the estate, whereas he meant the reverse. A sum not exceeding £10,000 has put a charge upon the estate which cannot take place (a).

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(a) In *White v. Row*, 1 cases there cited; vide also *Bro. C. C. 61.* it is laid down *Gravenor v. Hallum, Amb. 643*, and *King v. Denison*, 1 *V. and B. 260*, where this and all the other cases upon the doctrine of resulting trusts are cited.

out of the devise. *Vide the*

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(*Reg. Lib. A. 1764. fol. 21.*)

26th November,  
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S. C.  
*Amb. 474.*  
*Sewell, MSS.*

*CARR BRACKENBURY* having five younger children, by his will, bearing date the 10th of *February*, 1757, gave certain estates to trustees for 200 years in trust, to raise £10,000 to be paid to his younger sons, *George* and *Edward Brackenbury*, and to his daughters *Anna Susanna Brackenbury*, *Elisabeth Brackenbury*, and *Grace Brackenbury*; to his sons at twenty-one, and to his daughters at twenty-one, or marriage, for their portions:

Mistake in a will and codicil as to the amount of a fund out of which younger children were to be provided for, rectified on the evident intent of the testator.

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and directed that in case any of the said younger children should become an eldest son, that he should have no share of the said £10,000; and subject as before, he devised the same, and all his other real estates, to his eldest son in fee, whom he made residuary legatee.

He afterwards had four more younger children, and by a codicil bearing date the 28th of *September*, 1762, reciting that he had charged the before mentioned estates with the payment of £10,000 for his younger children, *George, Edward, Anna Susanna, Elizabeth, and Grace*, and taking notice that his family was increased since the making of his will, he charged his said estates with a further sum, viz. with the greatest advanced price that could be made thereof, for the portions of the plaintiffs, *William Brackenbury, Richard Brackenbury, Langley Brackenbury, and Charlotte Brackenbury*, to be paid at such time, and in such manner, and subject to such conditions and limitations as by his will he had directed for payment of the portions of his then younger children.

This was a bill by the four youngest children to establish the will and codicil, and to have the estate sold for the equal benefit of all the younger children. It was proved that the estate was of the yearly value of £354, and worth to be sold about £8770; and that the personal estate, after debts and legacies, did not exceed £1000.

Mr. *Yorke* and Mr. *Hoskins* for the plaintiffs.

The will and codicil are to be taken together, and a construction made upon both as one instrument. The testator's intention was to provide for the plaintiffs, who were born after the will, as well as for the other younger children, who were born before. He was mistaken in the value of this estate: he must have apprehended that it was worth more than £10,000. Suppose he had been asked whether he meant that the one set of younger

children should be paid their portions before the other, he would have answered, no, that all should partake of the fund equally. If the younger children, who were born before the will, are to be paid first, the other younger children will not have a shilling.

Courts of equity will not only construe words of a will according to the natural intention of the testator, but will transpose words, and give effect to the intention even contrary to the words. In *Uvedale v. Halfpenny*, 2 P. W. 151, they transposed the term providing for younger children, which stood after the limitations to the issue male, and placed it before them. In *Milner v. Milner* (a) the court gave effect to the intention contrary to the words. The testator in that case having made a mistake in the computation of a legacy, Lord *Hardwicke* thought that in the construction of wills the intent ought to be regarded, and that in order to effectuate it such a mistake ought to be relieved against.

Mr. *Sewell* for the five younger children, and Mr. *Harvey* for the heir at law.

However we may wish a better provision for the after-born children, the intention must be collected from the words made use of. They strongly import that the younger children born after the will are to be provided for out of the estate after the £10,000 is raised. A further sum is charged upon the estate for them, to be paid in such manner as the £10,000 is to be paid to the other younger children under the will. They are in the nature of residuary legatees, and take what is left after payment of the other legacies. There can be no doubt but that it is a mistake, and that testator would have provided otherwise if he had foreseen the event; but the court must

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judge from what he has done, not what he would have done.

*The Lord CHANCELLOR.*

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This is a question of intention arising out of the will and codicil. In cases of this kind it is absolutely necessary to take into consideration the subject-matter and the relative situation of the parties.

Though the will and codicil are very inaccurate, yet taking these circumstances into consideration, I have not the least doubt but that he intended at the time of making his will not to give legacies to his younger children with partiality, but to discharge his parental duty by giving all of them portions; and therefore, though he enumerates his sons and daughters by name, yet he describes them as *all his younger children*, and it is the same as if he had said, "I mean to give portions to all my younger children share and share alike." If he had died without making a codicil, it would not have exceeded the latitude of jurisdiction which this court has taken to construe wills according to the spirit of them, and none but one superior court can convince me of my error in such a construction. Courts of equity construe wills liberally, and do not shackle themselves with little narrow constructions.

I consider the codicil as made with two intents and purposes. First, to shew that he did not mean to exclude the after-born children, but intended to provide for them also as he had done before for the others. It enumerates the second set of younger children in the same manner as he had done the first set in the will, and incorporates them in the will. His second object was to augment the *quantum* of the fund as his family increased. After taking notice of the portions given by his will to his then younger children (not considered as particular objects

otherwise than as they were younger children), and that his family was increased, he charges the estates with a further sum ;—for whom?—for his family, for all his younger children.

It has been argued that he intended a distinct sum for the four children. But I think he intended to give them equal portions, and not legacies, which are arbitrary. Suppose the estate had been worth £30,000 instead of £10,000 ; could he have intended that in one event they should have nothing, and in the other twice as much as the former younger children? The plain way to construe it is to say, that he had before given £10,000 to his then younger children ; he now gives a larger sum, because his younger children are increased in number. It is observable, too, that he alludes to the conditions, &c. mentioned in the will, viz. the limitations over in case the estate should come to one of the younger sons.

Upon the whole I am of opinion, and must declare, that upon the true intent and meaning of the said testator's will and codicil, his intention was to make all his younger children's portions equal, share and share alike ; that the term devised to the trustees, together with the inheritance, be sold. But in case the produce of the real estate does not amount to the sum of £10,000, the same must be made good out of the personal estate of the testator as far as the same will extend.

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See a similar mistake in also *Danvers v. Manning*, 2 calculation rectified in a will *Bro. C. C. 18* ; *Stebbing v.* on the authority of *Milner v. Walkey*, *ib.* 85 ; *Williams v. Milner*, in *Phipps v. Lord Williams*, *ib.* 86 ; *Garvey v. Mulgrave*, 3 *Ves.* 613. *Vide Hibbert*, 19 *Ves.* 125.

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ALDEN v. GREGORY.

(Reg. Lib. A. 1764. fol. 213.)

Fraudulent conveyance set aside as against a purchaser with notice, notwithstanding a great length of time which had elapsed since the original transaction.

*CHARLES ALDEN* being seised in fee of a plantation at *Jamaica*, called *Barbican*, by his will bearing date the 8th of *August*, 1699, devised the same to his executors, to sell and divide the money arising from such sale between his wife and children. The wife died soon after, and by her will devised her share of the said money to her three surviving children, *Thomas*, *Judith*, and *Ann*. *Edward Brown* was the sole acting executor under the wills, and guardian of the children, and *Charles Chaplin* was manager and receiver of the estate in *Jamaica*.

As soon as the children came of age *Brown* proposed to them to become the purchaser of the estate, and to take the hazard on himself of discharging all the incumbrances; and accordingly articles of agreement were entered into, that on the 10th of *June* then next, at the costs and charges of the said *Edward Brown*, his heirs, executors, administrators, and assigns, they the said *Thomas*, *Judith* and *Ann Alden* would convey to him, or to whom he should direct, the fee simple of the said plantation, and all the estate which they had by virtue of the will of the said *Charles Alden*, or *Judith Alden*; and would likewise assign the debts and effects belonging to the estate of the said *Charles Alden* either in *Jamaica* or remitted to *England*. And the said *Edward Brown* covenanted to pay the said *Thomas*, *Judith*, and *Ann Alden* the sum of £900 each on executing such

conveyances, and the further sum of £600 each, with interest at five *per cent.*, within six months after the said sale, if the proceeds of the said sale should amount to so much.

By indentures of lease and release bearing date the 9th and 10th of *June*, 1721, the said *Thomas*, *Judith*, and *Ann Alden* conveyed the said plantation to the said *Edward Brown* and his heirs.

Soon after the above transaction *Brown* acquainted the children that he had agreed with *Chaplin* to sell the said estate, and accordingly by indentures of lease and release, bearing date the 15th and 16th of *September*, 1723, between the said *Edward Brown* of the first part, *Thomas*, *Judith*, and *Ann Alden* of the second part, and *Edward Brown* of the third part, in consideration of £2750 mentioned to be paid to the said *Edward Brown*, by consent of the said *Thomas*, *Judith*, and *Ann Alden*, and in consideration that the said *Charles Chaplin* did release the said *Edward Brown*, and the said *Thomas*, *Judith*, and *Ann Alden* from all demands on account of the said plantation of the said *Charles Alden*; the said *Edward Brown*, with the consent of the said *Thomas*, *Judith*, and *Ann Alden*, did release to the said *Charles Chaplin*, his heirs and assigns for ever, all the said plantation and lands in *Jamaica*; and the said *Thomas*, *Judith* and *Ann Alden* did confirm the same; and the said *Edward Brown* covenanted to indemnify the said *Charles Chaplin* against all debts and legacies of the said *Charles Alden*; and the said *Charles Chaplin* did release the said *Edward Brown*, and the said *Thomas*, *Judith*, and *Ann Alden* from all demands whatsoever on account of the said estates.

In the year 1724 *Thomas Alden*, and the husbands of his two sisters, filed their bill to set aside the said deeds, and the cause coming on to be heard at the *Rolls* on the

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2d of *March*, 1726, it was decreed that the said deeds should be set aside; that the said *Edward Brown* should account for the rents and profits received by him, and the purchase-money received by him from *Charles Chaplin*, without prejudice to the plaintiffs proceeding against *Charles Chaplin* (who was out of the jurisdiction of the court), to set aside the purchase.

On the 10th of *January*, 1728, the same plaintiffs filed a bill against *Charles Chaplin* in the *Court of Chancery*, in *Jamaica*, to which a plea was put in, and being allowed on argument, the bill was dismissed, but this dismissal was afterwards reversed in council; but before any further proceedings *Thomas Alden* died, 1st *January*, 1741, leaving one son, *John*, under age. *John Alden* came of age on the 17th of *May*, 1747, and having obtained from his aunts *Judith* and *Ann* (who had now become widows), a conveyance of their interest, he went over to *Jamaica* to prosecute the suit, but died there before he could take any further proceedings, in *April*, 1748. In 1750 his mother, who was his sole devisee and executrix, filed a bill of revivor and supplement in *Jamaica*; but *Charles Chaplin* dying, and his grand-daughter, *Mrs. Gregory*, the wife of the defendant *Gregory*, became his sole representative, the present bill was filed by the representatives of *Mrs. Alden*, the mother of *John Aden*, who was also dead, against the *Gregorys*, to set aside the said indentures of lease and release of the 15th and 16th of *September*, 1723, and for an account of the rents and profits from the time of filing the bill.

Several witnesses were examined on the part of the plaintiffs to prove the state of depression and subjection to *Brown* in which the *Aldens* were at the time of the execution of the deeds; that the plantation was worth nearly £900 *per annum*, and that the negroes on the estate alone were of the value of £3975.

Mr. *Willes* and Mr. *Wedderburne* for the plaintiffs.

Mr. *Yorke*, Mr. *Wheeler*, and Mr. *Bicknell* for the defendants, contended that even supposing the court should be inclined to think that the transaction is not entirely free from suspicion, yet that the length of time was so great that it ought not now to interpose; that it was a bill of thirty-one years' standing against Mrs. *Gregory*; that however improper *Chaplin's* conduct might have been, it cannot affect the defendants.

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*The Lord Chancellor.*

This bill is brought to set aside a conveyance made by *Brown*, who was devisee in trust and guardian of the children of *Alden*, who was owner of this *Barbican* plantation in *Jamaica*, and who devised it to his executors to be sold. And it also prays an account of the rents and profits from the time of the defendants coming into possession, waiving all retrospective accounts. The title is derived by the deed of the 16th of *September*, 1723, to *Brown* and the children of *Alden*, and from thence regularly to the plaintiffs, supposing that deed to be void as having been unduly obtained by fraud and imposition.

Upon the state of the case, and the plaintiff's proofs, three questions were stated by Mr. *Wedderburne* upon which the merits depended, and which were adopted and argued as such by the defendant's counsel.

The first was, whether there was any imposition or fraud in the original conveyance? And I am of opinion that there was the grossest imposition and deceit that ever came before this court. The estate is proved to have been let by Mr. *Beckford*, the guardian to the defendant Mrs. *Gregory*, then Miss *Chaplin*, for three years at £600 sterling, for that part alone which was the plantation; besides the pen, or farm, which was let for above £200 currency. And the defendants in possession have

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not controverted this statement of the value by a tittle of evidence. The negroes were charged in 1723 to the poll tax at 159, which at the rate of £25 each amounts to the sum of £3975, besides all other stock and utensils. The *cestuy que trusts* were still in the consideration of this court under Mr. *Brown*, their guardian, and Mr. *Chaplin*, their agent, with whom neither of them had settled any account, nor had either of them given the wards (still continuing such) any information respecting the estate. For the mother and two daughters were, as he swears by his answer, at different times his servants; and the son educated by him at school, and afterwards put apprentice to a milliner; and that he never settled any accounts with them, and could not, *Chaplin* never having settled any accounts with him. This was the case of *Brown*, the vendor to *Chaplin*, not under a title derived by purchase from his *cestuy que trusts*, but under the original will of *Alden*. His deeds were set aside, and proper accounts directed.

What was the case of *Chaplin*? *Habes confitentem reum*. His conveyance speaks now *he* is no more. *Chaplin*, the agent in trust for the children, offers £2750 for the estate, and all arrears of rent, sum and sums of money, goods and chattels, debts, duties, and demands, and other things whatsoever, which *Brown* as devisee, or executor in trust, might claim; which was accepted by *Brown* and the children as the best price that could be obtained for the said estate. If £2750 be the best price, why add any thing further? But this consideration, it was feared, would not give a colour. Before the consideration, therefore, is closed, a release is thrown in of *Chaplin's* demand on account of the management of the estate, upon which account he was indebted to them at least in the sum of £1100. *Chaplin*, not content with this, gets a general release from *Brown*, consisting of

downright falsehood, and winds up the whole with a release of the demands which he had on them for remitting the produce of their own rents and profits.

Happy for these abused, gulled, deluded people that there is a court of equity in *Great Britain*, out of the hurricanes and more tempestuous morals of *Jamaica*!

The next question is in effect, whether delay will purge a fraud? Never while I sit here. Every delay arising from it adds to the injustice, and multiplies the oppression (a).

The third question is, whether the defendant can cover himself as a purchaser for valuable consideration? I think there is no pretence for it. He married a wife, taking under the fraud, with actual notice in her of a suit pending.

(a) The point of length of time being no bar in cases of fraud was much discussed in the late case of *Whalley v. Whalley*, 1 *Meriv.* 436; see the following cases upon the subject there cited (*note*), *Deloraine v. Browne*, 3 *Bro. C. C.* 633. *Smith v. Clay*, cit. *ib. n.* *Herey v. Dinwoody*, 4 *Bro. C. C.* 258. 2 *Ves. jun.* 87. *Yate v. Moseley*, 5 *Ves.* 480. *Moth v. Atwood*, *ib.* 845. *Purcell v. Macnamara*, 14 *Ves.* 91. *Beckford v. Wade*, 17 *Ves.* 87. *Hovenden v. Lord Annesley*, 2 *Sch. & Lef.* 607. *Moore v. Blake*, 1 *Ba. & Be.* 62. *Medlicot v. O'Donnell*, *ib.* 156. *Gould v. Okeden*, 4 *Bro. P. C. Ed. Toml.* 198.

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NORTON v. RELLY.

*(Reg. Lib. B. 1764. fol. 66.)*

Grant of an annuity fraudulently obtained by a person having a spiritual ascendancy over a woman, who was under a state of religious delusion, set aside upon principles of public policy.

THIS was a bill filed by the plaintiff, a maiden lady, residing at *Leeds*, against the defendant *Relly*, a methodist preacher, and others, trustees named in a deed of gift executed by her to the defendant, praying that it might be delivered up to be cancelled, &c. The bill stated, that the defendant procured one *Woolfe* to transmit to her a letter, in which he expressed himself as follows: "That although unknown to her in the flesh, from the report he had of her, he made bold to address her as a fellow-member of that consecrated body wherein the fulness of the Godhead dwelt; that he had some thoughts of visiting her, the people to whom he preached (though they had none among them whom they would choose to hear in his absence) being willing that he should come among them at *Leeds* for a little time to preach the kingdom of God." He subscribed himself the plaintiff's "most affectionate brother in the flesh." The plaintiff was prevailed upon by *Woolfe* to invite the defendant to her house, where she entertained him for a considerable time, and gave him money to defray the expenses of his journeys: he afterwards paid her a second visit, when he prevailed upon her to accompany him to town, and become one of his congregation. In the course of two years he obtained from her about £150 by various pretences; and at last persuaded her to execute the deed in question, granting to him an absolute annuity of £50, secured upon her real estates in *Yorkshire*. The bill contained

several similar letters of the defendant, and stated several acts of fraud and imposition.

The *Solicitor-General*, Mr. *Yorke*, and Mr. *Hoskins*, for the plaintiff.

Mr. *Willes*, Mr. *Ambler*, Mr *Wedderburne* and Mr. Serjt. *Glynn* for the different defendants.

This is a new case, and as such ought to be treated with great caution. The court ought to examine it with the same spirit of liberality and toleration with which it always acts towards those whose religious opinions differ from those of the Church of *England*. The defendant is not what he has been represented by the bill, a methodist preacher, a term to which ignorance and illiberality have affixed a ludicrous and contemptuous idea. He is, in fact, a Protestant dissenting minister; an independent preacher, living by the exercise of his talents and exertions. This lady, who had taken a great liking to him, had engrossed the whole of his time and attention, and as a means to secure it for the future, granted him this annuity; she cannot now be at liberty to revoke a gift for which she had received a consideration she then considered as so valuable.

*The Lord* CHANCELLOR.

This cause, as it has been very justly observed, is the first of the kind that ever came before this court, and, I may add, before any court of judicature in this kingdom; matters of religion are happily very rarely matters of dispute in courts of law or equity.

In regard to Protestant dissenters, under which denomination it has been attempted to shelter and include the defendant *Relly*, no man whatever bears a greater regard and esteem for those who really are so than I do; and God forbid that in the present age the true dissenters of every kind should not be tolerated, or that the spirit

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of Christianity should, in this kingdom, lose the spirit of moderation ! I can and do esteem the professors of one equally with those of our own established church, to which, not only from the profession of my faith, but from my principles, I bear a higher veneration. But very wide is the difference between dissenters, and fanatics whose canting and whose doctrines have no other tendency than to plunge their deluded votaries into the very abyss of bigotry, despair, and enthusiasm. And though even against those unhappy and false pastors I would not wish the spirit of persecution to go forth, yet are not these men to be discountenanced and discouraged whenever they properly come before the courts of justice ? Men who go about in the Apostles' language, and creep into people's dwellings, deluding weak women : men who go about and diffuse their rant and warm enthusiastic notions, to the destruction not only of the temporal concerns of many of the subjects of this realm, but to the endangering their eternal welfare. And shall it be said that this court cannot relieve against the glaring impositions of these men ? That it cannot relieve the weak and unwary, especially when the impositions are exercised on those of the weaker sex ? It is by no means arguing agreeably to the practice and equity of this court, to insist upon it. This court is the guardian and protector of the weak and helpless of every denomination, and the punisher of fraud and imposition in every degree. Yes, this court can extend its hands of protection : it has a conscience to relieve, and the constitution itself would be in danger if it did not.

To come to the present case : here is a man, nobody knows who or what he is : his own counsel have taken much pains, modestly, to tell me what he is not ; and depositions have been read to shew that he is *not* a methodist. What is that to me ? But I could easily have told them what, by the proofs in this cause, and his

own letters, he appears to be—a subtle sectary, who preys upon his deluded hearers, and robs them under the mask of religion; an itinerant who propagates his fanaticism even in the cold northern countries, where one should scarcely suppose that it could enter. Shall it be said in his excuse, that as to this lady she was as great an enthusiast as himself when he first became acquainted with her, and, consequently, not deluded by him? It appears, indeed, that she wrote some verses “on the mystery of the union of the Father, Son, and Holy Spirit.” It is true that it appears by this that she was far gone; but not gone far enough for his purpose, as we shall find by his own letters: in one he says, “your former pastor has, I hear, excommunicated you; but let not these things discourage you, but put yourself in my congregation, wherein dwells the fulness of God.” How scandalous, nay, how blasphemous is this! In another his mystical expression runs, “you will be there weaned from men, and learn to complete the fulness of gospel peace.” Thus was she advanced step by step, and imbibed his doctrines till she became quite intoxicated, if I may use the expression, with his madness and enthusiasm.

But the very material, and most essential point in law, the consideration of the deed, say the defendant’s counsel, is the dedicating the principal part of his time in attending the spiritual concerns of this lady, and neglecting his flock, who thereupon deserted him (the only good thing, in my opinion, that appears in the cause). But did he receive no consideration, no recompense for his service? Let us examine a little. Does he come from *Leeds* to *London* in the ordinary way, a stage-coach? No: he must have a post-chaise, and live elegantly on the road at the plaintiff’s expense; who, it appears, at different times gave to or paid for him to the amount of £52 19s. in money, besides presents of liquor and other things. So

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that his own hot imagination was further heated we find by the spirit of brandy : for all which favours, in a third letter, his expression is, “ I thank you in the name of our Saviour for all kindness to me.” Thus is the Deity introduced to thank her for her services : but this, I suppose, like the fulness of God, as was observed by one of the counsel, is to be taken figuratively. I might, I believe, with more propriety say, that the acceptance of this £50 a year was figurative, and expressive of his designs upon the lady’s whole fortune.

We will take a short view how he proceeded to come at it. The lady comes to town by his persuasions, where possibly she had never been before ; goes and lives in *Surrey* as in an inquisition, for she is put into a house environed by a high wall, and no one is to have access to her but her pastor, or the attorney, on the present occasion of preparing the deed in question, whereby the defendant was to step into and secure a part of her fortune under the veil of friendship, or rather by lighting up in her breast the flame of enthusiasm ; and undoubtedly he hoped in due time to secure the whole by kindling another flame, of which the female breast is so susceptible ; for the invariable style of his letters is, “ all is to be completed by love and union.” But to return. In this place of inquisition she is by them tutored to be private in her charity ; so that her relations, who are injured, were to know nothing of her present bounty. But would not any man of honour in the profession have told her, “ Madam, you are going to do a thing which may embarrass your circumstances, and injure your relations ; a thing which the law will not support unless it is fairly and openly obtained ; and, therefore, unless you will apprise your friends of it, I will not be concerned”? This, I say, was incumbent on the attorney to have done ; but this was omitted, and it was done in secret.

Yet let it not be told in the streets of *London* that this preaching sectary is only defending his just rights, and must be supported in them : let them not be persecuted, I repeat, but many of them deserve to be represented in puppet-shows. I have considered this cause not merely as a private matter, but of public concernment and utility. Bigotry and enthusiasm have spread their baneful influence among us far and wide ; and the unhappy objects of the contagion almost daily increase. Of this not only *Bedlam*, but most of the private mad-houses, are melancholy and striking proofs. I have staid much beyond my time : I have given this cause a long and patient hearing, and, inasmuch as the deed was obtained on circumstances of the greatest fraud, imposition and misrepresentation that could be, let it be decreed,

That the defendant, *Relly*, execute a release to the plaintiff, Mrs. *Norton*, of this annuity, and deliver up the deed for securing it ; and if any difference arise, let the same be settled by the Master, who is to take an account of all sum or sums of money paid by the plaintiff, Mrs. *Norton*, to the defendant, or to his use ; for which purpose all proper parties are to be examined upon interrogatories, and all which sums the defendant is hereby decreed to pay, together with the costs of this suit.

I cannot conclude without observing, that one of his counsel, with some ingenuity, tried to shelter him under the denomination of an independent preacher : I have tried, in the decree I have made, to spoil his independency.

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The relief, in the case of *Huguenin v. Baseley*, 14 Ves. 273, was “ prayed upon the ground of undue influence exerted by the means of spiritual ascendancy.” It is evident from several passages in the argument of that case, p. 280, 286, &c. that the existence of the present case was not known. So by the civil law, which entirely

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prohibits donations *inter vivos* from persons standing in certain relations on the ground of the influence which they must necessarily possess, the case of a *confessor* is enumerated. *Pothier, Traité des Donations entre Vifs*, s. 1 cit. *ib.*

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HALE v. LAMB.

(*Reg. Lib. A. 1764. fol. 58.*)

Covenant in marriage settlement, that the settlor would surrender certain copyholds which were intermixed with his freeholds, to be settled upon the issue of the marriage, with limitations to collateral branches of the family; his eldest son, upon his marriage, covenants to suffer a recovery of the freehold (which was done), and to settle the copyhold (to which he was admitted in fee); upon a bill brought by a nephew of the first settlor, on failure of issue of that marriage, for a specific performance of the covenant, to surrender in favour

*WILLIAM HALE*, by his marriage settlement, bearing date the 26th of *April*, 1712, settled certain freehold estates, and covenanted to surrender certain copyhold lands to the use of himself for life; remainder as to part to his intended wife for life; remainder for a term to raise portions for younger children; remainder to the first and other sons of that marriage in tail; remainder in the same manner to his sons by any other wife, with collateral limitations to his uncles.

*Paggen Hale*, the eldest son of the said *William Hale*, by his marriage settlement, bearing date the 19th of *November*, 1742, covenanted to suffer a recovery of the freehold estates (which was afterwards done), and to settle the premises upon the issue of the marriage.

*Paggen Hale* having died without issue, this was a bill brought by the grandson of the uncle of *William Hale*, the first settlor, to have a specific performance of the covenant in the settlement of the 26th of *September*, 1712, for the surrender of the copyhold lands.

The *Attorney-General*, Mr. *Willes*, Mr. *Wilbraham*, and Mr. *Hoskins*, for the plaintiff.

of collaterals: held, that though the consideration of marriage extended to collaterals, yet that the son by the covenants on his marriage, and by his admission in fee, had taken the copyholds discharged of the specific limitations.

Wherever the conscience of the covenantor is bound, this court will decree a specific performance, if the consideration is sufficient. In the present case the considerations are blood, the name of the testator, and the entirety of the possession. Blood is a consideration to raise a use at common law; *Jenk. Cent. 2 Ro. Ab. 782*, it will also do this in the case of collateral limitations contracted for. *Osgood v. Strode*, 2 P. Wms. 245, where the court considered the father as a purchaser of the collateral limitations. *Vernon v. Vernon*, 5 P. W. 594, where a collateral limitation to a brother was decreed, though the estate had never come from the father, and he was but a party to the deed. The cases of *Jenkins v. Kemish*, 1 Lev. 150. and *Watts v. Bullas*, 1 P. W. 60, are still stronger. *Goring v. Nash* (a) is a very recent confirmation of this doctrine. The statute of fraudulent conveyances is no objection; the covenant immediately bound the covenantor, and left the same lien on the heir.

Mr. Perrot and Mr. de Grey for the defendant.

The remainder in the present case is voluntary, and cannot be executed against an heir. Lord *Hardwicke* held, that courts of equity cannot lay down any other rule than what is followed at law upon the statute of *Elizabeth*. In all the cases which have been cited, the father was either a purchaser or a party to the deed. In *Goring v. Nash*, in *White v. Stringer*, 2 Lev. 106, and *Osgood v. Strode*, the estate was settled by the father. In *Stephens v. Trueman* (b), he was a purchaser of the equity for the collaterals by making a contingent interest certain. The case of *Bellingham v. Lowther*, 1 Ch. Ca. 243, is the only case where the estate came from the husband, and there the consideration was held not to extend to the collateral limitations; the others were provisions of

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(a) 3 Atk. 185.

(b) 1 Ves. 73.



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the father, who is the best judge of the provision, and of the *quantum* the child ought to take. *Cook v. Arnham*, 3 P. W. 283. For. 35. But in this case *Paggen Hale* has, by his acts, made himself the absolute owner of the copyholds, and barred all right of the plaintiff.

*The Lord CHANCELLOR.*

11th Dec. 1764.

This bill was brought for a specific performance of a covenant in a settlement of the 26th of April, 1712, for the surrender of some copyhold lands. On the part of the defendant it was insisted that the court would not decree a specific performance of a covenant voluntary, and without consideration : and this was the single question. This was answered, not so much by controverting the position as by fact ; for the position is undoubtedly true, that a court of equity will not decree a specific performance of a voluntary covenant, which is in equity no covenant at all, and only a nominal one at law. But they insisted that a covenant to settle on the blood would raise an use to give a *subpoena*, and to call for this court to aid in the execution of the estate ; and this they established by cases at law, and authorities in this court : *Osgood v. Strode*, where the claim of a nephew was established by two Lord Chancellors ; *Watts v. Bullas*, where the court said, that because the consideration of blood would at common law raise an use, and, as before the statute of 27 Hen. 8. such *cestuy que use* should have compelled an execution of the use in a court of equity, so would this imperfect conveyance raise a trust in respect of the consideration of blood, and consequently ought to be made good in equity, which is good sense (a) ; *Vernon v. Vernon*, which is to the same purpose.

(a) Lord Hardwicke, however, in *Goring v. Nash*, censured the doctrine laid down by Lord Keeper Wright in *Watts v. Bullas*, " his reasoning being too large, owing

It seems, therefore, that a settlement made on marriage, with extension to collaterals, if defective in law, should be made good in equity for the same collaterals; for the consideration of marriage and settling the estate runs through all the limitations, and the authorities confirm the reason. Nor do I see any sound objection to this; for a man's serious disposition by will supersedes the heir at law without injustice, and these cases have nothing to do with the statutes against fraudulent conveyances. Therefore, if *William Hale*, the settlor, had died without issue male attaining twenty-one, I think the uncle would have been entitled to a specific execution of the covenant; because, in such case, it was consistent with the will and intent of Mr. *Hale*, the settlor.

But as the preceding limitations of the tenancies in tail conveyed an incidental dominion over the remainders, and *Paggen Hale* actually suffered a recovery of the freehold, with which the copyholds are by the original settlement taken notice of, to lie intermixed, if *William* had executed the covenant, there cannot be a doubt but *Paggen Hale* would have barred the remainder: his own covenant in his marriage settlement bound him to do it. But as the covenant was only executory, and he was left in full legal dominion of the copyholds, he had nothing to do but to declare that he would take them, discharged of any specific limitations, which, if actually made, he could and might have destroyed; and *that* he has manifestly done by his own repugnant covenant in his marriage settlement, and by his admission in fee.

It is, in my opinion, absurd to say, the descent of the executory covenant should put him into a worse condition

to his being then new in the consideration of blood to the court, and pursuing the raise an use." .  
maxims of law too far as to

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than that covenant executed by a settlement; and that he could not loose, *eodem modo quo ligatur*, by a declaration of a contrary will, and contrary covenant.

Bill dismissed.

The question how far the consideration of marriage in a settlement will extend to collateral relations of the settlor, has not yet received any satisfactory adjudication. The recent cases upon the subject are, *Johnson v. Le-gard*, 3 *Mad.* 283. 6 *M. & S.* 66. *Clayton v. Lord Grey de Wilton*, 3 *Mad.* 302. 6 *M. & S.* 67 n. *Fairfield v. Birch*, cit. *Sugd. Purch.* 645. and Appendix. *Sutton v. Chetwynd*, 3 *Meriv.* 249. *Cormick v. Trapaud*, 6 *Dow. P. C.* 60.

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Cit. 1 *Bro. C. C.*  
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PELHAM v. ANDERSON.

(*Reg. Lib. B.* 1764. fol. 63.)

Bequest of money to build and endow an hospital upon land not already in mortmain, held to be void under the stat. 9 *Geo.* 2.

CHARLES PELHAM, by his will, bearing date the 4th of May, 1760, directed that his executors should build and endow an hospital for eight poor persons on the south-east side of *Broclesbie* churchyard, or at such other place as the testator should, by writing under his hand, appoint, in case he should not have done it during his lifetime; for which purpose the testator charged his personal estate with the sum of £2000. And if the said building should be begun in his lifetime, or he should leave any plan thereof, then he desired that such plan might be pursued and executed.

Mr. *Willes* and Mr. *Hoskins* for the next of kin; Mr. *Yorke* and Mr. *Perryn* for the charity.

The Lord *Chancellor* held the above devise void, under the statute of mortmain.

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*Vide* the *Attorney-general v. Tyndall*, *ante*, p. 207. and the note at the end of it.

BODENS v. LORD GALWAY.

12th Dec. 1764.

(*Reg. Lib. A. 1764. fol. 39.*)

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*Amb.* 478.

*MELIORA BODENS*, by her will, bearing date the 26th of *April*, 1758, after giving several legacies and annuities, gave the residue of her estate to the plaintiff, *George Bodens*, in manner following: viz. her house and all her effects to be sold and laid out in the funds for the plaintiff (after all the legacies were paid) during his life; and if he had no heirs, to his sister, *Mrs. Jane Watson*.

Bequest of personal estate to *A.* during his life, and if he has no heirs, then over; held, the bequest over was void, as being too remote.

The cause came on at the Rolls on the 25th of *May*, 1761 (*a*), when his Honour directed a general account, but declined giving any opinion as to what interest the plaintiff took in the personal estate. It now came on for further directions.

*Mr. Serjt. Whittaker*, *Mr. Yorke*, and *Mr. Crofts* for the plaintiff.

The *Solicitor-General*, *Mr. Ambler*, and *Mr. Bicknell* for the defendants, contended, that the court would construe the word *has* in the same way as the word *have* was construed in *Target v. Gaunt*, 1 *P. W.* 432. and other similar cases, by which means the devise over would be good in case the plaintiff had no issue at his death; it was also urged, that this was a contingent devise to the children of the plaintiff: if he should have any, to them; if not, to the defendant.

(*a*) *Amb.* 398. nom. *Boden v. Watson*.

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I have laid it down as a principle, that in all questions of this nature the whole will must be taken together, and a judgment formed from thence of the testator's intention. Were I to determine this limitation over to be good, I should destroy the principal intention of the testatrix, which was, that *George Bodens* and his issue should take before *Mrs. Watson*. I cannot imply a gift to the issue as purchasers, for such an implication must be necessary; which is not the case here. The word *heirs* must mean heirs of the body, and the testatrix certainly intended that not only *George Bodens*, but also his issue, should take preferably to *Mrs. Watson*; and that can only be by transmissibility, for they cannot take as purchasers: it is the same as if it had been given to him for life, and to the heirs of his body; and if no such heirs, then over. The failure of issue is general, and I can find nothing to confine it to a particular time; I must therefore decree the residue of the money to be paid to the plaintiff (a).

(a) The cases upon the subject of limitations over of personal property, which are too numerous to bear citation, are collected in 2 *Bridgeman's Digest*, 244. To these may be added *Sprigge v. Jeffery*, 1 *Cox*, 63. *Doe v. Ellis*, 9 *East*, 382. *Barlow v. Salter*, 17 *Ves.* 479. *Lyon v. Mitchell*, 1 *Mad. Rep.* 467, and the report of *Tothill v. Pitt* subjoined to it. *Brounker v. Bagot*, 1 *Meriv.* 271. *Donn v. Penny*, *ib.* 20. *S. C.* 19 *Ves.* 545. *Elton v. Eason*, 19 *Ves.* 73. *Britton v. Twining*, 3 *Meriv.* 183. *Kinch v. Ward*, 2 *S.* and *S.* 409.

The cases upon this point comprised in the present publication, are *Salkeld v. Vernon*, *ante*, Vol. I. p. 72. *Gray v. Shawne*, *ib.* 153. *Taylor v. Clarke*, *ante*, 202. *Grey v. Montagu*, *ib.* 205. *Howston v. Ives*, *ib.* 216. *Destouches v. Walker*, *ib.* 261.

## ASHBY v. BLACKWELL.

(Reg. Lib. Min. Trin. 1765.)

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Amb. 503.

THE plaintiff being possessed of £1000 Million Bank stock, for some time received the dividends herself, but afterwards employed *John Price*, a broker, to receive them for her. *Price* forged a letter of attorney from her empowering him to sell the stock, which he did to the defendant, *Blackwell*, and the stock was transferred into *Blackwell's* name in the books of the company.

A joint stock company having permitted a transfer of stock under a forged letter of attorney: held that the company, and not the fair purchaser, should bear the loss.

This bill was brought for a re-transfer of the stock, or satisfaction from the other defendants, the trustees of the Million Bank. It being agreed upon all sides that the plaintiff was entitled to relief, the question was, whether the defendant, *Blackwell*, or the company should bear the loss.

It appeared that by an order of the company made in 1713, no transfer was to be made of their stock by virtue of any letter of attorney executed in the country, unless attested by the minister of the parish and one of the churchwardens; nor by a letter of attorney executed in town, unless attested by two housekeepers known to one of the directors, or to the secretary of the company. That the forged letter of attorney was attested by two names, which had no addition to them when produced to the secretary of the company, and that he asked *Price* who they were, who answered that the plaintiff executed the letter of attorney in *Savile-row*, and that the witnesses were housekeepers there; and that upon receiving such answer the secretary wrote against their names "*Savile-row*." That in fact the witnesses were waiters in *Sam's*

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coffee-house, in *Cornhill*. That *Price* had transferred Bank and South Sea stock and annuities under other forged letters of attorney to a large amount, for which he was indicted, convicted, and hanged; and that the Bank and South Sea Company had made good the losses; and that since the detection of this forgery the Million Bank Company had made an order, by which they for the future would make good such losses.

The *Solicitor-General* and Mr. *Willes* for the plaintiffs.

Mr. *Wedderburne* and Mr. *Madocks* for the defendant *Blackwell*.

The company considered themselves as bound to see that transfers were properly made, and had therefore made rules and regulations with respect to them. The purchaser of stock does not know till he comes to accept the transfer whether it is made by the owner in person or by attorney. It would be looked upon as impertinent in him to ask sight of the letter of attorney; the propriety and validity of it is under the care of the company only. This is the practice in all the great companies, and is the constant method of transferring stock. If it were otherwise it would affect the companies, whose interest it is to make negotiations of stocks as easy as possible. The company have broken their own laws by admitting a letter of attorney not attested according to their rules. The case of *Hyldyard v. South Sea Company*, 2 *Wms.* 76. is erroneously reported (a), for upon search of the register's book it appears to have been heard before Sir *Joseph Jekyll* upon bill and answer only. Even supposing the determination to have been right, it must have been owing to there not being any proof of the method of negotiation, and then the court was under a necessity of deciding upon some principle, and adopted that of *caveat*

(a) *Vide* Mr. *Cox's* note.

*emptor*. But here is evidence to distinguish the present from that case. All the other companies having made good the loss upon the other forgeries shews their sense of the justice of the case, and the new order of this company speaks their sense of it too.

Mr. *Yorke* for the company.

The decree in the case of *Hyldyard v. South Sea Company*, and the authority of *Monk v. Graham* before Lord *King*, when chief justice, have induced the company to stand this suit. And in a question between innocent persons the principle of *caveat emptor* takes place; as it was said by the court in the former of those cases, it was incumbent upon the purchaser, and at his peril, to see that such letter of attorney was a true one. It was more his concern and in his power to inquire into the reality of it than of any person: so that the rule of *caveat emptor* is properly applicable to him. The company are no more than trustees, or as was said in that case, instruments and conduit pipes. The rules and regulations which they made were for the credit of the company, but were not intended to throw upon them that care and caution which both law and reason require of the purchaser, than whom no other person can be so properly concerned to take it. This company is a private company, and the same reasons which have induced the great public companies to make good their losses does not hold to this.

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The question for me to determine is, whether the trustees of the Million Bank Company, or in other words, the Million Bank Company or *Blackwell* are to sustain the loss occasioned by this forged transfer of the plaintiff's stock; and, notwithstanding the authorities cited, I am of opinion that the company must sustain the loss. By the



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A trustee, whether a private person or body corporate, must see to the reality of the authority empowering him to dispose of the trust-money; for if forged, it is in consideration of law and equity a nullity, and the right remains as before.

original deed of agreement entered into when the company was formed, there is a clear direction in what manner stockholders shall hold, and in what way they shall be deprived of their stock, to which the mode of transfer is tied up. It was the original intention that transfers should be made personally, and it seems by operation of law the method of transfers by letter of attorney was adopted upon this maxim, *Qui facit per alium facit per se*.

The letter of attorney is no part of the title, but an authority to transfer. A trustee, whether a private person or body corporate, must see to the reality of the authority empowering them to dispose of the trust-money; for if the transfer is made without the authority of the owner the act is a nullity, and in consideration of law and equity the rights remain as before. This is such plain, clear reasoning, that I need do no more in order to give the plaintiff complete relief than declare that she is entitled to £1000 share of the stock of the company, and that they having transferred this from her name to the name of another without authority, should restore her name to that share, and pay her the dividends accrued since the transfer. But this would involve the company and Mr. *Blackwell* in a suit, which is equally ripe for my decision now.

Against Mr. *Blackwell* the rule *caveat emptor* is alleged, and that he ought to have inquired into the reality of the authority, and this objection is founded on the case of *Hyldyard v. South Sea Company*, and the reasons of that case. But my judgment differs both from the one and the other, both from the decision and reasoning. I think it was not incumbent upon *Blackwell* to inquire into the letter of attorney, because I think the letter of attorney in this and similar cases is no part of the purchaser's title. The title is the admission into the com-

pany as a partner *pro tanto*, he accepting the stock on the conditions of the partnership. The letter of attorney is only the authority to the company to transfer. In fact they have so considered it, for they have made regulations to prevent frauds in letters of attorney, which they now insist concerned not them, but the purchaser, which is repugnant, and that he must go into every part of the kingdom to satisfy himself that it is attested by the minister and churchwarden.

In the present case the company (or which is the same thing, *Jeffreys*, their secretary,) thought it their duty to examine this letter of attorney, but did it with gross negligence. The testimony came deficient; he altered it upon *Price's* representation, without authority and contrary to the rule laid down in their own books; and with writing in the custody of the company which would have detected the forgery. The purchaser on the other hand trusted nobody but the company. He was admitted to this stock, and accepted the transfer according to the terms of the original deed of contract. He must not be deceived by the company.

On the other hand they must and ought to answer for their and their servant's negligence. And it will be of no public detriment if my decree tends to make the directors of public companies to attend to the business of those companies, and teaches them not to leave the important transactions of millions to undirected clerks and book-keepers, with illiberal salaries, and who therefore dare not look a broker in the face.

I am therefore bound to decree that the company restore to Mrs. *Ashby*, the plaintiff, her share of £1000, by replacing the same in her name, and account for and pay to her the dividends accrued since the said transfer; and that they pay to Mr. *Blackwell* the sum he paid for the

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said transfer, together with interest at four *per cent.* ; and that they pay the plaintiff and Mr. *Blackwell* their costs.

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As to payment upon forged *Taunt.* 489. *Bruce v. Bruce*, authorities, *vide Price v. ib.* 495. *Smith v. Mercer*, 6 *Neale*, 3 *Burr.* 1354. *Bl. Taunt.* 76. *Fuller v. Smith*, *Rep.* 390. *Jones v. Ryde*, 5 1 *Ry. & Mo.* 49.

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*Amb.* 510.  
 3 *Burn. Eccl.*  
*Law*, 439.

### THE ATTORNEY-GENERAL v. CHOLMLEY.

(*Reg. Lib. A.* 1764. fol. 531.)

Where an agreement having been made between the rector and inhabitants of a parish, allotting lands in lieu of the ancient glebe, with some addition, in consequence of the rector's losing certain rights of

common by inclosure, and also providing an annual pecuniary compensation in lieu of tithes, which upon the successor's declining to abide by, an amicable suit was instituted in this court, to which the ordinary (but not the patron, who was the King,) was made a party, and the parishioners agreeing to increase the stipend, a decree was made by consent to ratify the articles: held that this agreement, though acquiesced under for 80 years (40 of which, however, the rector against whom the decree was made had remained incumbent), was not binding as to the pecuniary composition, the patron not having been a party, and the composition having been made only with regard to the past, and not to the future increasing value of the tithes.

THIS was an information by the *Attorney-General* on behalf of his majesty, as patron of the rectory of *Burton Coggles*, in the county of *Leicester*, and at the relation of the plaintiff, Dr. *Blair*, the rector, and a bill by the said Dr. *Blair* in his own right against the defendant, *Cholmley*, as proprietor of lands in the parish, the defendants, *Hopkinson* and *Nidd*, as tenants of part thereof, and the Bishop of *Lincoln* as ordinary of the diocese;

and it prayed that a decree of the *Court of Chancery*, confirming an agreement entered into between a former rector and some of the parishioners, by which the then rector had an enclosure and allotment, and a pecuniary compensation in lieu of glebe and tithes, might be declared null and void as against his majesty and his successors, patrons of the said church, and the plaintiff *Dr. Blair*, and all future incumbents of the said rectory; and for an account of tithes become due to the plaintiff, *Blair*, since the 12th of *January*, 1762, in respect of the lands in the occupation of the defendants, &c.

The defendants by their answer admitted the presentation, &c. and the ownership and occupation of lands within the parish, and that they had taken the tithes thereof to their own use since the said 12th of *January*, 1762; but they insisted that the plaintiff, *Dr. Blair*, was not entitled to tithes in kind as claimed by the bill; for that by articles of agreement dated 21st of *January*, 1664, made between *Montague Cholmley*, Esq. an ancestor of the defendant *Cholmley*, and *Henry Hall*, Esq. the then owners and proprietors of all the lands within the said town and parish of *Burton Coggles*, of the one part, and *William Ayscough*, clerk, the then rector of the said rectory, of the other part; reciting among other things that there was a general inclosure agreed upon and intended to be carried into execution between the said parties, touching the field of *Burton Coggles*; and that forasmuch as the said parties had agreed that a considerable part of the lordship should still be kept in tillage for the maintenance of husbandry, and had likewise agreed to better and advance as well the said rectory and yearly profits thereof and thereout arising to a considerable value over and above what the same had been theretofore yearly worth and let for, as well as their own lands; and also reciting that the glebe lands belonging to the said

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rectory did not consist of above 84 acres; and that the said rectory and glebe lands, with all manner of tithes thereto belonging, had not been let for above £100 *per annum*. It was therefore agreed, and the said *Cholmley* and *Hall* did thereby covenant with the said *Ayscough* and his successors, that he should for ever thereafter enjoy the several parcels of ground therein particularly mentioned, and by him chosen, in lieu of the glebe lands formerly used with the said rectory; which several parcels of ground are therein mentioned to contain 113 acres, one rood, and 36 perches, which were therein recited to be of far greater annual value than the said 84 acres of glebe, in consideration whereof the said *Montague Cholmley* did, for himself and his heirs, covenant with the said *Ayscough*, and his successors, incumbents of the said rectory, to pay yearly to him and them the sum of £35 13s. in satisfaction of all tithes, great and small, to grow due to the said *Ayscough* and his successors from the said *Cholmley*, or any of his tenants in the said parish (except as therein mentioned), which sum was agreed to be charged upon the lands therein mentioned, and reputed to be of the yearly value of £50, part of which sum, namely 8s. 3d. was thereby agreed to be paid by the said *Cholmley* and his heirs, to the intent that the said *Ayscough* and his successors should pay tithes of a close therein mentioned, called *Pickworth Pasture*, to the parson or vicar of *Basingthorp*, within which the same lay. And the said *Henry Hall* did thereby for himself and his heirs covenant in the like manner to pay the yearly sum of £44 15s. 3d. in satisfaction of all tithes due from him or his tenants (except as therein mentioned), which sum of £44 15s. 3d. was agreed to be charged upon the lands therein mentioned, and reputed of the yearly value of £55; and it was further agreed that the said *Cholmley* and *Hall* should for ever thereafter enjoy such part

of the glebe lands belonging to the said rectory as should happen to be inclosed within any of the plots of ground newly inclosed within the said lordship, and taken in by them respectively, without any claim to be thereto made by the said *Ayscough*, or his successors, discharged from the payment of all tithes whatsoever (excepting and reserving to the said *Ayscough* and his successors the benefit of all marriages, christenings, churchings, burials, and Easter offerings thereafter happening within the said parish); and it was further agreed that the said *Ayscough* and his successors should for ever thereafter be discharged of all constable lays, as well for repair of highways as otherwise, and of all duties and payments, as well to church as poor, except such poor as might thereafter fall upon the town by reason of persons inhabiting it, or the parsonage-house, or cottage thereto belonging, which persons were at all times thereafter to be relieved by the said *Ayscough* and his successors.

That in pursuance of the said articles of agreement all the lands within the said parish were inclosed and enjoyed according to the said articles, and that the rectors of the said parish had ever since enjoyed the said 113 acres, one rood, and 36 perches, and the same were then enjoyed by the plaintiff, *Blair*; that the sums of money agreed to be paid by the said *Cholmley* and *Hall* were received, with the rents of the said 113 acres, one rood, and 36 perches, by the said *Ayscough*, and afterwards by *John Adamson*, his successor in the said rectory, in lieu of all their tithes and former glebe lands, till the year 1677; but that in the year 1677 *Adamson* declining to abide by the agreement, the said *Montague Cholmley*, together with the infant daughter and heirs of the said *Henry Hall*, then deceased, exhibited a bill in the Court of Chancery against *Thomas*, the then Lord Bishop of Lincoln, within whose diocese the said parish of *Burton*

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*Coggles* lies, and against the said *John Adamson*, to carry the said articles of agreement into execution, and to be quieted in the possession of the lands against the claims of the said *Adamson*, otherwise than under the said articles; and that the said *Adamson* by his answer refused to perform the agreement, unless the plaintiff in the said suit would agree to what he had proposed, which they or their agents had promised, viz. to add £16 to the £80 8s. 3d., that is to say, £7 1s. 10d. by the said *Montague Cholmley*, and £8 18s. 2d. by the said *Mr. Hall*, which if they consented to, and would secure the same on all the lands within the said rectory, he was willing the same should be confirmed by a decree. That the cause was heard on the 2d of *July*, 1677, when it was decreed that the said articles should stand ratified and confirmed, to be observed and performed by all the parties, plaintiffs and defendants, their heirs, successors, executors, administrators, and assigns, and it was thereby decreed, according to the offer in the said defendant's answer, that over and beside the annual sum by the articles agreed to be paid by *Mr. Cholmley* in lieu of tithes, the said *Mr. Cholmley*, his heirs and assigns, his and their tenants, should pay the additional annual sum of £7 1s. 10d., being in all £42 15s. 2d.; that the same should be charged on all the lands of the said *Mr. Cholmley* within the parish; and that the said infant daughters and heirs of *Mr. Hall*, their heirs and assigns, and their tenants, should pay in like manner the additional annual sum of £8 18s. 2d., being in all £53 13s. 5d.; and that the said plaintiff and defendant, *Adamson*, their heirs, successors, and assigns, should for ever thereafter hold and enjoy the several parcels of lands allotted to them by the said articles, in lieu of their ancient lands and glebe against each other, and against all other persons claiming under them or under the said *Henry Hall*, deceased,

according to the intent of the said articles ; and that the plaintiffs in the said suit, their heirs and assigns, paying the said annual sums of £42 15s. 2d. and £53 13s. 5d., should stand discharged from the payment of all tithes, according to the said articles. The defendants admitted that the annual payment of £96 8s. 3d. is not an adequate compensation for the tithes in kind of the parish, but insisted that there were 29 acres, one rood, and 36 perches of glebe allotted to the rectory by the articles of agreement, in addition to the 84 acres of glebe ; and that upon the whole the annual value of the rectory was much increased by means of the articles and decree ; that neither the patron nor ordinary were parties to the agreement ; and that neither his then Majesty, nor his *Attorney-General*, on his behalf, was a party to the suit in which the said decree of 1677 was pronounced, but insisted that the said articles and decree were binding on the plaintiff, Dr. *Blair*, and his successors.

They likewise insisted that in *Hilary Term*, 3 Jac. 1. *Thomas Bell*, the then rector, having instituted a suit in the *Spiritual Court* against *John Nix*, then a householder in the said parish, for subtraction of tithes, the said *Nix* applied to the Court of *King's Bench* for a prohibition, and that by the record of the prohibition it appears that certain customary payments were due to the said *Bell*, as rector, in lieu of tithes.

The only point which both the defendants and plaintiffs entered into proof of, was to ascertain from old terriers and surveys the quantity of the glebe to which the rector was entitled before the articles of the agreement ; and as to the quantity which he then enjoyed, on the one hand it was contended by the defendants that the rector was before the time of entering into the agreement entitled only to 84 acres of glebe, and that upwards of 113 acres having been allotted to him by the articles (of which

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they said the several rectors had been ever since in the possession), in that respect, therefore, the agreement was very beneficial to the rectors, and consequently to the patron; and on the other hand, it was contended by the plaintiff, Dr. *Blair*, and proved from four different terriers, that the quantity of the glebe which the rector enjoyed before the time of entering into the agreement was above 102 acres, of which 84 acres, 3 roods, 13 perches were arable, and 17 acres, 2 roods, 17 perches were ancient inclosure, and a small part meadow, amounting in the whole to 102 acres, one rood, 30 perches, as also a right of common of two cow-gates and ten sheep-gates annexed to an ancient cottage belonging to the rectory, which with the right of common belonging to the original glebe lands of 102 acres, were fully equal to the 113 acres of the present glebe. And it appeared that the mistake in the agreement, which mentions the whole quantity of ancient glebe lands as consisting only of 84 acres, upon which the defendants laid great stress, arose from the quantity of arable land only being 84 acres and upwards, over and above the 17 acres, 2 roods, 17 perches of ancient inclosure. That the fact was, that between the year 1649 and 1662, the dates of the two terriers, both being prior to the agreement of 1664, the then incumbent, Mr. *Ayscough*, made a private exchange of the 84 acres of arable land, which lay dispersed at the time in four fields, for the same quantity of acres of land in two fields, 80 of which in one field lay contiguous to the parsonage-house, and four in another at some distance; he also made another exchange of an old close of 11 acres, called *Acron Croft*, being within the parish, for a close called *Pickworth Pasture*, containing the same quantity of land, but adjoining the other 80 acres, and lying in the parish of *Basingthorp*; and as this close was chargeable for tithe to the vicar of that parish, they agreed to pay the


rector of *Burton Coggles* a sum of 8s. 3d. annually as an equivalent for discharging the tithes due to the said vicar of *Basingthorp*; so that at the time of the inclosure and agreement in *January*, 1664-5, there clearly appeared to have been only an addition made to the glebe of about 10 or 11 acres, as a compensation for the rights of common belonging to the said glebe and cottage; and it likewise appeared that the present glebe is exactly the same as that described in the two last terriers prior to the agreement, with the addition only of 11 acres for the said rights of common.

The *Attorney-General*, Mr. *Yorke*, and Sir *Anthony Abdy* for the information.

This is a question of great importance, and arises upon the agreement of 1664, which is the original foundation of the defendant's claim of exemption from the payment of tithes. There are two capital objections to that agreement, supposing it unimpeached by the 13 *Eliz.* 1st. It was confessedly entered into between the then owners of lands within the parish and the then rector only; and therefore as neither the patron nor ordinary were parties, it could not bind any future incumbent. The 2d objection to it is, inadequacy of compensation. The agreement appears to be founded either in fraud or mistake. It recites that the glebe belonging to the rectory did not exceed 84, though it actually exceeded 102 acres, besides a very valuable right of common.

But what the defendants principally rely upon is the decree of 1677 in confirmation of the agreement. But the same objection for want of parties holds still stronger here. The rectorial tithes are aliened, and the patron, whose particular right is so much affected, is again omitted as a party. The objection is also considerably strengthened by the consideration that the party in this case is the *King*, whose rights cannot be taken away by collusion.

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Where a transaction is illegal, a decree can give no force to it. It is particularly provided against by the 43 *Eliz.* c. 9. s. 8. where it is declared, "That all judgments thereafter to be had for the intent to have and enjoy any lease contrary to the said statute, or any of them, shall be deemed void, in such sort as bonds and covenants are appointed to be void which are made for that purpose." For by the 14 *Eliz.* c. 11, "all bonds, contracts, promises, are declared to be of the same nature to all intents and purposes as leases, many evil disposed persons having (as is there recited) defrauded the true meaning of the 13 *Eliz.* c. 20, by asserting that bonds and covenants were not in law taken to be leases."

The relief prayed by the information cannot be objected to on the score of laches. Mr. *Adamson*, who was party to the decree, and consequently bound by it, lived till the year 1718. Dr. *Blair*, who is answerable only for his own acquiescence, was not presented till 1756, and the information was filed in 1762, which, considering the difficulties which he had to encounter in procuring an accurate knowledge of the defendant's claim from exemption, is but a very short time. But at all events this argument can be no objection to the crown, which cannot be prescribed against. It is therefore almost unnecessary to take notice of the acquiescence (if any) of Dr. *Blair* and his predecessors.

The information by the amendment has waived any relief in respect of the glebe. It was impossible to restore Dr. *Blair* to the possession of those rights which had been enjoyed by the rector before the agreement was entered into. But it is no objection that the agreement cannot be rescinded in part because it cannot in *toto*. The impossibility of doing complete justice cannot be urged as a reason for not doing as much justice as the state of things will admit. That part of the agreement

respecting the tithes was totally distinct from what related to the glebe.

As to the prohibition, it must be considered that no final judgment was ever pronounced in the suit in which it issued. How then can the writ of prohibition be set up as a bar to the rector's claim of what is due by common right? Besides, the defence arising under the prohibition is inconsistent with the recitals in the agreement.

The *Solicitor-General* and Mr. *Madocks* for the defendants.

At common law the parson, patron, and ordinary might alien the possessions of the church, and though the 13 *Eliz.* has restrained this power, yet courts of equity have always given a liberal construction to that act, and expounded it by a maxim of common law, *ecclesia meliorari, non deteriorari potest*. They have therefore held that the legislature did not intend to prevent exchanges and bargains by which succeeding incumbents might be benefited. There have been many instances of decrees establishing agreements between the lay parties, their heirs, executors, and administrators, and against the incumbents and their successors. The case of *Edgerley v. Price*, *Finch's Reports*, 18, is a remarkable instance of this. That was a bill to have an agreement for inclosing certain lands and common fields made between the plaintiff, who was lord of the manor, the rector, and others, who were seised of lands in the parish, carried into execution. The report says that upon the cause coming to be heard before the Lord Keeper *Finch*, he found upon what was said and read that the agreement was good, and the inclosure was for the benefit of all the parties interested, but that *Price*, the parson, and the Lady *Baltin-glass* were the chief persons who opposed the establishing of this inclosure, he ordered them to attend together

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with the plaintiff *Edgerley*, who was lord of the manor, and this was in order to an accommodation, and he satisfying them that the agreement was beneficial to all parties, and particularly to the church, because the plaintiff agreed to pay to *Price* and his successors £60 *per ann.* (besides the lands allotted to him in exchange,) &c. The decree was that the agreement and the inclosures made pursuant to it stand ratified and confirmed, and that all parties, their heirs, assigns, and successors enjoy their respective allotments in severalty against each other, their heirs, assigns, and successors; that at Christmas next the plaintiff should pay to *Price*, the parson, £130, being the arrears of the £60 *per ann.* from the time of the agreement, and to secure the payment thereof, &c. There is no instance of any of these agreements ever having been impeached by a decree of a court of equity; and this practice continued until by the frequency of parliaments it became more convenient to have them established by the legislature. Had the judges who sat in the courts of equity at that time been of opinion that, upon the construction of that statute, it was contrary to law to establish such an agreement, this practice would never have originated. A different opinion will now disturb an uninterrupted and quiet enjoyment of lands and tithes for upwards of a century. The plaintiffs have made no proof of the inadequacy of the agreement at the time that it was made, and it is not to be presumed inadequate when the incumbent and the bishop both subscribed to the propriety of it in their answers.

But if Dr. *Blair* wants equity, he must do equity. Whatever may be considered of the question at law, yet in this court no agreement can be rescinded without restoring the parties to their original situation. If this agreement is to be rescinded it must be rescinded *in toto*,

and not in part, as is now desired. He ought not to have a decree for tithes in kind but upon the terms of his yielding up possession of the surplus glebe lands.

The record in the *King's Bench* is evidence of some weight to shew that the ancient mode of tithing in the parish before the decree of 1677 was according to the customs stated in that record. And even though it be not taken as decisive proof of the customs, yet it is a strong ground for directing an inquiry respecting those customs.

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*The Lord CHANCELLOR.*

This is an information brought by the *Attorney-General* 17th June.  
at the relation of Dr. *Blair*, for an account and payment of tithes in kind: the claim of the rector arises *de communi jure*. The defence set up against the claim is, first, an agreement entered into in the year 1664 between the then rector and the owners of the lands in the parish, for accepting a yearly sum of £80 in lieu of tithes. I am of opinion that the agreement on the face of it is unequal as to the consideration thereby agreed to be paid to the rector; for it appears that the agreement was entered into in order to effectuate an inclosure of the open fields in the parish, and no consideration is given as to the future improvement of the lands by such inclosure, of which the occupiers would reap the benefit. But I am clear that even if the agreement had been equal, it would not have bound the successor in the rectory, but would be void as against him.

The next defence set up against the plaintiff's claim is a decree in 1677, which appears to have been made in a cause, instituted by consent, between the same parties that were parties to the agreement in 1664; for as to the bishop of the diocese being a party, I consider him set up as a man of straw, merely for form. And it is material

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to observe, that the parties themselves did not consider the agreement which had been executed as binding on the rector; for they considered the annuity of £80 as not being an adequate consideration for the rector's having given up his tithe in kind, and therefore they entered into a new agreement for allowing him an addition of £16 8s. 6d. *per annum*; and on being allowed that addition, the rector, by his answer, consents to have the agreement established. It is true that the decree founded on this agreement does, *in verbis*, bind the successors in the rectory; but this was a decree founded on an agreement, which the court never enters into the propriety of, when a bill is brought by consent of parties; and all such decrees are drawn up by the register of the court in the words of the agreement, as a matter of course: but I am of opinion that such decree cannot bind the successor. The defendant's counsel have, it is true, cited cases of a similar nature, and urged the case of *Edgerley v. Price*, reported in *Finch*. I have looked into that case, and think it a very extraordinary one, particularly as the judge sent for the parties to attend him. I can pay no credit to it, nor look upon it as any authority, or anything more than the dream of some note-taker in this court.

The agreement and the decree being thus laid out of the case, the next consideration is, whether a court of equity can relieve in the present case. And I am of opinion that there is not a better rule than that of *equitas sequitur legem*. It is a fixed rule at law that the crown and the church cannot be prescribed against: the first, on account of its high dignity; the second, on account of its imbecility: *quia fungitur vice minoris, conditionem suam meliorare potest, deteriorare nequit*. At common law, although the church could alienate with consent of patron, parson, and ordinary, yet it was under various restrictions. The patron must be absolutely seised in fee

simple: if he was seised only of a fee simple conditional, or base fee, the alienation was void. Thus it stood till the disabling statutes were passed, which were wisely framed to prevent all alienations except by authority of parliament. The patron was under the influence of interest: the parson complied with false notions of gratitude; and the ordinary, where the crown was the patron (especially if he had one of the lesser bishoprics), was not so unprejudiced in his consent as he ought to be. In the present case, the bar set up by the defendants amounts to a mode of alienation. If the decree be void, as I am of opinion it is, what then is there to send to law, when the point is about the extent of a decree of this court? And even if it were sent thither, it must come back again to be ultimately determined here.

It has also been objected that the length of time ought in this case to bar the plaintiff; but I think the legal rule, that no prescription can run against the church, must be adhered to. And, indeed, the length of time for which this agreement has been acquiesced under, is not so great as at first sight appears: Mr. *Adamson*, who was rector in 1677, and party to the decree, and had a right to establish the agreement during his life, did not die until the year 1718.

It has been further objected by the counsel for the defendants, that the plaintiff's bill prays to set aside the agreement so far only as relates to the composition in lieu of tithes; but submits that the lands allotted in lieu of ancient glebe may continue in the state they now are in, which the defendants insist the plaintiff cannot do, but that the agreement must be confirmed or rescinded in *toto*; and that the rector must give up the lands allotted to him under the agreement, which they contend are larger in quantity than the ancient glebe, and which additional quantity was a further consideration to the rector in the exchange. But this would be making wild work;

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and, indeed, the proposition was only adopted at the bar as an effort of despair. I am clear that the lands allotted to the rector were only in lieu of the ancient glebe, and that the difference arose from the different quality of the land. The agreement, though contained in the same deed, is distinct: one part allotting land in lieu of the ancient glebe, the other providing an annual stipend in lieu of tithes. I have no reason to think that the lands allotted to the parson were for more than the glebe and tithes. It is the quality of the land, and not the quantity, which must determine the extent of the composition.

Upon the whole the inclosure of the lands was for the general benefit of the parish; and such lands will be continually increasing in value, while the composition given to the rector in lieu of tithes will be continually diminishing in value: the composition here looks only to the value of the past tithes, without any regard to the future increasing value of tithes. In all acts of parliament which are made upon compositions with parsons, they are allowed a compensation for tithes upon improvements in *futuro*. If in the present case the parties had made an allowance for the future improved value of tithes, they would have stood on a different footing, and I should not have been inclined to relieve: they then would have been purchasers for a valuable consideration by allowing for the future improvements. The equity of this court would have been suspended by setting up equity against equity, and I should have left the rector to his legal remedy.

Decree an account of tithes from the time of filing the information.

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This decree was afterwards affirmed in the *House of Lords*, the case of *Mortimer v. Lloyd*, *ib.* 44. & *O'Connor v. Cook*, 8 21st November, 1768. 7 Bro. Ves. 537.  
 P. C. Ed. Toml. 34. Vide also

## NORTHCOTE v. DUKE.

(Reg. Lib. B. 1764. fol. 403.)

17th June, 1765.

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Amb. 511.

*JOHN ANDREWS*, by indenture, bearing date the 24th of *November*, 1718, in consideration of £350 and a broad piece of gold, paid him by *Thomas Northcote*, demised certain premises to the said *Thomas Northcote*, his executors, administrators, and assigns, for the term of 99 years, determinable upon three lives; and it was declared by a clause contained in the said indenture, that if the said *Thomas Northcote*, his executors, administrators, or assigns, should at any time during the term thereby granted, devise, grant, let or set the said premises for any greater or longer term than for seven years at most at any one time, except it should be by his or their last will and testament, and to and for the use of any woman that should be the wife of the said *Thomas Northcote*, or any child or children of the said *Thomas Northcote*, without the licence, consent or agreement of the said *Thomas Andrews*, his heirs or assigns, in writing, first had or obtained, then it should be lawful for the said *John Andrews*, his heirs or assigns, to re-enter on the said premises, and repossess the same as in his or their former estate.

The plaintiff, who was now the only surviving life, being entitled under the will of his father, subject to certain charges, in 1752, demised the said premises to *John Mills* for the term of fourteen years, without licence. The assignee of *Andrews*, the lessor, threatening to bring an ejectment, this was a bill to be quieted in possession,

Clause of re-entry in a lease for three lives in case lessee or his executors, &c. should lease for more than seven years without licence, the third life being in possession under his father's will, and being his executor, leased for fourteen years: held, that it was no forfeiture, as he had not notice of the condition, and as the lease could not extend beyond the life of the lessor, it could not pass an interest for fourteen years certain.

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and to restrain the defendants from proceeding at law. It stated, that the plaintiff had not the original lease in his custody, and was a stranger to the proviso.

Mr. *Yorke* and Mr. *Hoskins* for the plaintiff.

The execution of the lease is a dispensation in the proviso, and therefore the lease is not avoided at law. It was decided in *Dumpor's* case, 4 Co. 119. that once a dispensation, it is always so. It is said there, "that the lessors could not dispense with an alienation at one time, and that the same estate should remain subject to the proviso after." But even though the lease be void at law, the forfeiture may be relieved against in equity. *Hack v. Leonard*, 9 Mod. 90. *Cage v. Russel*, 2 Vent. 352.

The *Solicitor-General* and Mr. *Jones* for the defendant.

This differs from *Dumpor's* case, for here the execution is part of the deed itself; the lease is therefore clearly avoided at law, nor can equity relieve. Equity can only relieve where the damage is certain, and where the breach of the covenant which occasioned the forfeiture has been accidental. In *Descarlett v. Dennett*, 9 Mod. 22, relief was refused against a voluntary breach. *Wafer v. Mocato*, *ib.* 112, was a case of covenant not to alien without licence, where the court refused to relieve against forfeiture.

#### *The Lord Chancellor.*

The executor who made this lease for fourteen years, took the general personal estate under the will, without knowing the particular circumstances relative to the lease of this estate. The lease itself appears to have been in the hands of another person: in this state of ignorance he grants this lease for fourteen years.

Upon these facts three questions arise; first, Whether this be a forfeiture at law? Secondly, If it be a forfeiture,

whether it is relievable in equity? and, thirdly, If relievable, upon what terms it is so?

To the first, it was said not to be forfeited at law by reason of the exception in the proviso; and it was argued on the principles in *Dumpor's* case, that the exception is a dispensation; but, in my opinion, the two cases stand on different grounds. In *Dumpor's* case the condition was, not to alien to any person whatsoever; and the subsequent licence operated as a release of the condition, and then the law took place, viz. that a release for a moment is a release for ever. In the present case the restraint is tied up, exclusive of the devise and provision for his family, and has never been released.

But the two last questions determine my judgment. When you come for a forfeiture you must be very exact and certain. I am of opinion that the lease is not a breach of the condition, because it is not for a certain time of duration, for life is uncertain; and the lease is not, nor could be, for fourteen years absolutely in all events, but must determine with the life-interest in the lessor. In the next place, the plaintiff taking the estate as executor, is like the case of an heir taking a freehold, and ought to have notice of the condition, in order to effect his interest by way of forfeiture for breach of the condition.

Even a court of law ought to see that in such a case there is some injury done to make the act a breach of the condition so as to forfeit the estate. It can be of no use to the landlord in this case to exact the forfeiture: let the plaintiff be a good or bad tenant, it will not affect the landlord, for the representatives of the first lessee are liable for the rent. It would be to suppose the lessee would hurt himself, in order to hurt the landlord.

It was said, that equity will not relieve where the act is voluntary; but the landlord may not have been injured

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at all, or in a manner for which I can compensate him. I take the rule to be, that in all cases where a person has broken a condition, and forfeited a penalty, equity will relieve if there can be compensation (a). I think the court may relieve where a tenant cuts down timber. In this case there is no complaint that the tenant does not occupy the land very properly. These are at present my thoughts; but I shall not determine the question now, but retain the bill for twelve months, with liberty for the defendant to bring his ejectment.

(a) The doctrine of giving relief in a court of equity in cases of forfeiture for breach of covenant, upon the principle of compensation, has been much discussed in the late cases of *Hill v. Barclay*, 16 *Ves.* 402. and 18 *Ves.* 56. *Bracebridge v. Buckley*, 2 *Price*, 200. *Rolfe v. Harris*, cit. *ib.* 206 n. *Reynolds v. Pitt*, cit. *ib.* 212 n. *White v. Warner*, 2 *Meriv.* 459. which have overruled the doctrine laid down by Lord *Ers- kine* in *Sanders v. Pope*, 12 *Ves.* 282. This relief may now be considered as confined, according to the doctrine laid down by Sir *T. Plumer* in *Rolfe v. Harris*, to cases where the omission and consequent forfeiture have been the effect of inevitable accident, and in which the injury or inconvenience arising from it is capable of compensation; but where the transgression is wilful, or the compensation impracticable, the court will not interfere.

As to refusing to compel the specific performance of covenants to repair, &c. vide *Rayner v. Stone*, ante, 128. and note.

GARDEN v. PULTENEY.

1st May, 22d

June, 1765.

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Amb. 499.

SOUTHCOTE v. EARL OF BATH.

(Reg. Lib. A. 1764. fol. 530.)

THOMAS PULTENEY being possessed of £1747 6s. 11d. South Sea stock, £4675 5s. 11d. Old South Sea annuities, £2736 14s. 7d. Bank stock, and £2000 East India stock, by will, 7th of January, 1741, gave several annuities for lives; and directed that what dividends were then due upon any of the stocks or funds in the Bank, South Sea, India, or other funds or securities, and not received by him, should be received by his executrix, and laid out in purchase of some other stocks with the advice of his nephew, *William Pulteney*, esquire, (afterwards Earl of Bath), for providing a fund for the better payment of the said annuities in case his then present estate in the stocks was not sufficient for that purpose. And after the decease of the several annuitants, he devised in these words: I give to my nephew, *William Pulteney*, esquire, his executors, administrators, and assigns, all my principal stocks in the Bank, South Sea, India, and other public funds or securities, or in other securities whatsoever, in trust, for his son, *William Pulteney* (afterwards Lord *Pulteney*), now an infant; and for such younger son and sons as the said *William Pulteney*, now an infant, shall or may have, to be equally divided between them, share and share alike; and in case there shall be but one younger son, then I give the whole to that younger son.

Bequest of money in the funds to A. in trust for B. an infant, and for such younger son or sons as B. shall have, equally to be divided between them; and in case there shall be but one younger son, then the whole to him: held, that B. took only a life interest, subject to which his younger children took the whole.

A bill had been brought by the next of kin of the testator, in the lifetime of Lord *Pulteney*, to have several

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questions determined, and (*inter alia*) to have the opinion of the court what interest Lord *Pulteney* took under the devise. Upon the hearing of the cause, on the 19th of *June*, 1745, the court declared, that so much of the testator's personal estate as was not disposed of by his will, belonged to, and ought to be divided amongst his next of kin, subject to his debts and funeral expenses; and declared that his cash, ready money, Bank notes, arrears of rent, money due to the testator upon balance of account with the Bank, and debts due to him at his death, and also the surplus dividends accrued on his stocks and annuities during the life of the annuitants, ought to be considered as not disposed of by his will; but that all such dividends and sums of money as were due and in arrear on any of the stocks and annuities at the testator's death, and also the whole surplus of the dividends accrued or to accrue, due on the stocks and annuities since the decease of such of the annuitants as died first, ought to be considered as disposed of by the will for the benefit of Lord *Pulteney*, subject to the contingencies in the will: an account was directed accordingly, and the distribution to be made of the undisposed personal. And it was ordered that such surplus dividends as had arisen since the decease of such of the annuitants as died first, or which should thereafter arise during the minority of Lord *Pulteney*, should be placed out at interest in the name of Lord *Bath*, in trust for Lord *Pulteney*; and as the interest and dividends arising thereon should amount to a competent sum, the same was to be placed out at interest in like manner for the benefit of Lord *Pulteney*. An account was directed of what was due at the testator's death upon any of the said stocks, or funds, and securities, and the same were to be placed out at interest in the name of Lord *Bath*, in trust for Lord *Pulteney*, for his life, and afterwards subject to the contingencies in the

will ; and that the interest and profits which had accrued or should accrue due on any such securities during the minority of Lord *Pulteney*, should, from time to time, be placed out in like manner as before directed, touching the surplus dividend accrued due since the death of the annuitant dying first ; and Lord *Pulteney* was to be at liberty to apply to the court for payment or assignment of what he should be entitled unto when he came to the age of twenty-one ; and after his death, or any other person who might be entitled according to the contingencies in the testator's will, were to be at liberty to apply to the court as they should be advised. Further directions and subsequent cost were reserved.

Upon the 1st of *February*, 1757, Lord *Pulteney* agreed to sell to Lord *Egremont* his right in reversion, or rather expectancy, after the death of the Earl of *Bath*, in two pieces of ground in *Piccadilly* (on one of which *Egremont-House* is since built, and which pieces of ground were then let for a term of years on a building lease), for £3000 ; and made an assignment of £1747 6s. South Sea stock, and £4674 5s. Old South Sea annuities, to Lord *Egremont*, as a security for repayment of the money in case he should die before Lord *Bath*, or should not after Lord *Bath*'s death have it in his power, and should not make Lord *Egremont* a good title. Lord *Pulteney* afterwards borrowed money of Mr. *Drummond* on security of the stocks devised by Mr. *Pulteney*.

Lord *Pulteney* died without issue on 12th of *February*, 1763 ; plaintiff took out administration with his will annexed as a creditor. After his death Lord *Bath* paid off *Drummond*, and took an assignment of his security in the name of Mr. *Dickenson*. This was a bill to have the stocks transferred to the plaintiff, after paying what was due to Lord *Egremont*'s representatives, and to Lord *Bath*. Lord *Bath* being since dead, the suit was revived

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against General *Pulteney*, his representative. The defendants, who were next of kin to *Thomas Pulteney*, insisted that Lord *Pulteney* was entitled under the will to the stocks for his life only, with remainder to his younger children: and that as he died without leaving issue, the next of kin of the testator were entitled.

The cause having come on to be heard,

The Lord *Chancellor* said, that the decree having directed that the money due and in arrear at the testator's death, upon any of the stocks or funds, should be placed out in the name of Lord *Bath*, in trust for Lord *Pulteney* for his life, and afterwards subject to the contingencies in the will, had precluded the parties from entering into the question.

The cause was thereupon ordered to stand over, with liberty to petition for a rehearing of the original cause.

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Both causes came on this day.

Mr. *Yorke* and Mr. *Hoskins*, for the plaintiffs, contended that Lord *Pulteney* was entitled to the whole fund, subject to open and let in his younger children to share with him.

Mr. *de Grey* and Mr. *Wedderburne* for the next of kin were stopped by the court.

*The Lord Chancellor.*

I think it is extremely clear that Lord *Pulteney* was intended to take only an estate for life, with remainder to his younger sons. The latter words which give the whole to a younger son in case there shall be but one, cannot have effect by any other construction. The interest given to the sons is a tenancy in common, and there cannot be a limitation on a tenancy in common. Lord *Hardwicke*, on hearing the original cause, was clearly of that opinion; otherwise the direction for payment of the interest to

Lord *Pulteney* at twenty-one would have been wrong, for he might have had children before twenty-one. I consider the interest of Lord *Pulteney* and his younger sons as distinct, and that the words "equally to be divided" related only to the interest of such sons; any other construction would be contrary to the intention of the testator.

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Decree affirmed.

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1 July, 1765.  
S. C.  
Amb. MSS.

MILLAR v. DONALDSON.

(*Reg. Lib. Min. App.* 1765.)

IN these causes bills had been filed by the plaintiffs as assignees of Mr. *Thompson* to restrain the defendants from printing and vending certain publications; and injunctions had been obtained till answer, or further order.


The defendant afterwards put in his answers, and made it a question whether, as the two terms of fourteen years each, under the statute 8 *Anne*, was expired, the plaintiff was entitled to the sole printing and vending the books on the foot of his common law right.

Mr. *Yorke*, on a former day, moved that the injunction might be continued to the hearing, and it being a new question, and of consequence, the motion stood over; and the Lord *Chancellor* was to have copies of precedents delivered to him on both sides.

It now came on again.

Mr. *Yorke*, for the plaintiff, argued, that the author or his assignee had a common law right of property, and stated

Injunction obtained by the assignee of an author after the expiration of the two terms of years allowed by the statute of *Anne* dissolved, the common law right of the author being so extremely doubtful.

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the definition of property as laid down in *Selden's* "Mare Clausum", and *Grotius*. In the Duke of *Queensberry's* case (a), and in Mr. *Forrester's* case (b) relative to his reports, injunctions were granted before the books were published: he also cited the case of *Tonson v. Walker* (c).

The Lord *Chancellor* observed, that it was the only case which came near the present, but there the injunction was continued, as the printing *Milton* with notes might be considered as a new work.

The Lord *Chancellor*, without hearing any other counsel, dissolved the injunction. He said his reasons were, that it was a new question (none of the cases being precedents in point, being orders made before the expiration of the fourteen years given by the statute). That it was a point of so much difficulty and consequence, that he should not determine it at the hearing, but should send it to law for the opinion of the judges (d). That it would therefore only serve to put the parties to expense, and protract the determination if he should countenance the injunction, and could answer no good end. He desired to be understood as giving no opinion on the subject, but observed that it might be dangerous to determine that the author has a perpetual property in his books, for such a property would give him not only a right to publish, but to suppress too.

(a) *Vide post.* Duke of *Queensberry v. Shebbeare*, 329.

(b) *Forrester v. Waller*, 13 June, 1741.

(c) *Cit. 4 Burr.* 2326.

(d) In consequence of this opinion, the question was afterwards brought forward in the shape of a special verdict, as it appears in 4 *Burrow*.

40 Ch. D. 353.  
1907. 1 Ch. 129.

DUKE OF QUEENSBERRY v. SHEBBEARE. 31st July, 1758.

(Reg. Lib. A. 1757. fol. 477.)

THE *Attorney-General*, the *Solicitor-General*, and Mr. *Hoskins*, now shewed cause against dissolving an injunction obtained on a former day by the plaintiffs, who were the representatives of *Edward*, Earl of *Clarendon*, to restrain the defendants from printing, publishing, or disposing of Lord *Clarendon's* History of the Reign of *Charles* the Second, from the Restoration to the year 1667. The bill stated that *Henry*, late Earl of *Clarendon*, was, at his death, possessed of a MS. copy of the History of the Reign of *Charles* the Second to the year 1667, in the handwriting of *Edward*, Earl of *Clarendon*, to the sole property whereof the plaintiff, the Duke, as administrator to him, became entitled (a).

Injunction to restrain the printing of an unpublished MS., a copy of which had been by the representative of the author given to a person under whom defendant claimed, but not with the intention that he should publish it.

The defendant *Shebbeare*, by his answer, stated, that the defendant *Francis Gwynne* had informed him that the said *Henry*, Earl of *Clarendon*, so long since as thirty-three years, delivered to his the said defendant's, *Gwynne's*, late father, to whom he was administrator, the original MS. of the history, that he might take a copy thereof, and make use of the same as he should think fit, of which a copy was taken. He admitted the agreement with *Gwynne*, and insisted upon his right.

Mr. *Sewell*, Mr. *Wilbraham*, and Mr. *Green*, for the defendant *Shebbeare*.

The Lord Keeper continued the injunction to the

(a) One original had been destroyed in a fire at *Petersham*, 4 Burr. 2398.

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hearing. He said, that it was not to be presumed that Lord *Clarendon*, when he gave a copy of his work to Mr. *Gwynne*, intended that he should have the profit of multiplying it in print; that Mr. *Gwynne* might make every use of it, except that.

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Dr. *Shebbeare* afterwards recovered before Lord *Mansfield* a large sum against Mr. *Gwynne*, for having represented that he had a right to print. 4 *Burr.* 2331, 2398.

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This case established what the statute. *Vide* also Lord was admitted in the late case and *Lady Perceval v. Phipps*, of *Souhey v. Sherwood*, 2 2 *V. & B.* 19. *Gee v. Prichard*, 2 *Swa.* 402, and the cases has a property in an *unpub-* there cited. *Morris v. Kelly*, *lished work independent of* 1 *J. & W.* 481.

25th June,  
 2d July, 1765.

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#### HEATH v. HEATH.

(*Reg. Lib. A.* 1764. *fol.* 499.)

Power of altera-  
 tion of estates  
 tail as they were  
 to come in *esse*  
 into tenancies for  
 life: held to be  
 void.

*BAILEY HEATH* by his will bearing date the 21st of *August*, 1750, devised all his manors, &c. at *Stanstead* in the county of *Essex* (subject to certain annuities, &c.), to his sons respectively for life, successively with remainder to the first and other sons of such sons successively in tail male, with divers remainders over; and he thereby declared that notwithstanding he had before limited the succession of his estate to his several sons according to their seniority, yet it was his will, and he thereby directed that it should be lawful for each of them as they should

be respectively seised in possession, by will duly executed, to alter and change the course of succession aforesaid, and on failure of issue of his own body, to appoint the next immediate remainder or succession of the premises to any other of the testator's sons, without regard to seniority, and that such son so appointed should take the next immediate estate for life, with remainder over to support contingent uses, and to his first and other sons in tail male, as thereinbefore limited to testator's eldest son, and his first and other sons. And the testator directed that every of his sons so to be appointed should when in actual possession of the premises, have the same power of appointing by his will the succession or next remainder, in default of issue male of his own body, to any other of testator's sons for life, and to his issue male, in manner aforesaid, so long as the testator should have more than one son living. Upon a bill brought to carry the trusts of the will into execution,

The *Lord Chancellor* directed that the trusts of the will and codicils should be performed and carried into execution, except so far as they relate to the alteration of estates tail into tenancies for life, which is void by law.

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*Vide the Duke of Marlborough v. Earl of Godolphin, ante, Vol. I. 404.*

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Amb. 508.

# HEWETT v. HEWETT.

(Reg. Lib. A. 1764. fol. 481.)

Power contained in a will for the devisees for life, when in possession, to cut down timber as four trustees, or the survivors or survivor of them should assign, allow of, or direct, all the four trustees being dead: held, that the court would execute the trust by referring it to a master to see what timber was fit to be cut down from time to time.

Sir *THOMAS HEWETT*, by his will, dated the 10th of *February*, 1725, devised *inter alia* certain estates, in default of issue of his body, to Sir *Hardolph Wasteney*, *Thomas Hume*, *Francis Pole*, and *John Tooker*, Esqrs. and their heirs, for the uses therein mentioned, viz. to the use of Sir *Andrew Thornhaugh* for life; remainder to *John Thornhaugh*, his son, for life, with remainders to his first and other sons; remainder to *Hugh Howard* and *John Hewett* the plaintiff, respectively for life, with remainders to their first and other sons successively, with divers remainders over. Then followed this power, "And that the said Sir *Andrew Thornhaugh* and *John Thornhaugh* his son, and *Hugh Howard* and *John Hewett*, shall have power and liberty to cut down and fell such trees and wood growing upon the premises when they shall be in the actual possession of the same as the said Sir *Hardolph Wasteney*, *Thomas Stone*, *Francis Pole*, and *John Tooker*, or the survivors or survivor of them shall assign, allow of, or direct, by any writing under their hand." All the trustees being dead, the present bill was filed by the plaintiff for the opinion of the court, whether the power to cut timber remained, or was at an end.

The *Attorney-General*, Mr. *Taylor White*, and Sir *Anthony Abdy* for the plaintiff.

Two questions arise upon the present case; 1st. Whether any interest in the timber was given by the testator to the tenants for life; and 2dly. If so, whether

this court can, under the present circumstances, interpose in order to regulate the enjoyment of that right. The first point was settled in *Lewis Bowles's* case, where it was decided that without impeachment of waste was not merely an exemption from suit, but an interest actually vested in the tenant for life, he being thereby entitled to the property in the timber when cut down. The present is a gift and legacy of such trees as the trustees should appoint, without any personal discretion vested in them, and as such, any other set of trustees, or this court, if necessary, may be substituted to act in their room. So in the case of a will; acts to be done by executors without any personal confidence reposed in them, may be done by an administrator, as a bequest of such a horse as the executor may choose, &c. So also in the common case of a bequest of maintenance, according to the discretion of trustees, the court, if necessary, refers it to a master.

Mr. *Sewell* and Mr. *Willes* for the defendants.

The construction contended for by the plaintiff would be making a new will. The liberty of cutting down trees is not a liberty of cutting down generally, but of cutting conformably to a particular description pointed out in the will: which description, as it cannot be complied with, the liberty is gone. The power given to the trustees is a naked power, which, if it cannot be exactly complied with, is at an end. The books are full of instances of this nature. In *Franklin's* case, *Moor*, 62, *pl.* 172, testator devised that *I. I.* and *I. K.* should sell his lands by the advice of the parson of *D.*: before the sale, the parson died: held, the trustees could not sell. So in *Dalison's* Reports, 45, *pl.* 36. Testator made *A.*, his wife, and *I.* his executors; he devised his lands to his wife for life; remainder to his daughter and her issue; and if she died without issue, that executors should sell with the consent

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of *C.* The daughter died without issue, and then *C.* held that the executors could not sell. There are a great many other cases of the same nature. *Lee's case*, 1 *Leon.* 285, pl. 386. *Butler v. Bray, Dyer*, 189. *Hutton v. Simpson*, 2 *Vern.* 722. *Peyton v. Bury*, 2 *P. W.* 626. If, indeed, the present were a case of timber decaying on the premises, the court would interpose, as it has often been known to do for the benefit of the tenant for life. But there is nothing of that sort pretended. It is a mere question at law.

The *Lord Chancellor* observed, that this was a new case, and might be of great importance to the parties, and as it might be a leading case, he did not mean to give a present judgment.

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*The Lord CHANCELLOR.*

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The question is, whether the plaintiff can and ought, under the protection of the court, to enjoy any benefit in felling the timber, the four trustees being dead, when, as I must now suppose, the timber is mature and fit to be cut.

To divide that question for consideration, it is 1st. Whether the testator intended he should have benefit from the timber, though the trustees, who, during their life, or that of the survivor were to assign, allow, or direct by writing under their hand, are dead. And 2dly. If so, whether this court ought to interpose, or leave the plaintiff to do as by law he can.

The testator, by the limitations in his will, made the plaintiff tenant for life barely, which would have given him an interest in the timber for botes. That he intended more is certain, and it seems as certain that the trustees were interposed as supervisors only, to prevent destruction in the tenants for life to the inheritance. It

is absurd to suppose that the testator meant his trustees should have an arbitrary volition, whether the several tenants for life should have any benefit in the fall of timber. If a bill had been brought against the trustees to assign, allow, or direct timber mature and fit to be cut, would it have been an answer, "we do not think fit to allow it, *stat pro ratione voluntas?*" I think the court would not have been satisfied with such an answer.

The power is, "And that the said Sir *Andrew Thornhaugh*, and *John Thornhaugh* his son, and *Hugh Howard* and *John Hewett*, shall have power and liberty to cut down and fell such trees and wood, growing upon the premises, when they shall be in the actual possession of the same, as the said Sir *Hardolph Wasteney*, *Thomas Stone*, *Francis Pole*, and *John Tooker*, or the survivors or survivor of them shall assign, allow of, or direct by any writing under their hand." The testator certainly intended that the trust should be co-extensive with the four estates for life, and as both depended on the contingencies for life, the will, to have effectuated that intention, should have added the heirs of the survivor. The omission of that was a mistake, and as such, I think, ought to be rectified in this court.

There seems to be a similar mistake in a subsequent clause; the testator has given his wife the use of his capital messuage, &c. and an annuity to be paid by his trustees, with a proviso, that if his wife neglect to keep in repair his capital messuage, or park stocked as directed, then the trustees, the survivors or survivor of them, should retain the said annuity for the same purposes. This, too, is confined to the trustees' survivor personally. Yet, if the wife was alive now the trustees are dead, the court would direct the repairs to be done out of the annuity; for it is the duty of this court, and of all courts, to give all devises, as far as their respective

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jurisdiction admit, their full and specific execution. The office of the trustees is not confined to any personal qualification but such as is general, and may be substituted, viz. to see what is fit and proper to be cut.

Mr. *Sewell* observed, that it was not a power to cut down generally, but under a description; but that is taking it too narrowly. It is rather a power vested to fell, upon condition the trustees allow of the timber proposed to be felled; and when that condition becomes impossible by the act of God, it would be either pure at law, which was certainly not the intent; or the power would be gone, while the estate, to which it was annexed, remained, which I think could not possibly be the intent either. As the law, from the nature of its jurisdiction, must take this in one of these senses or the other, and both seem against the testator's intent, I think it improper to leave it to law, as Mr. *Sewell* contended for. Mr. *Sewell* admitted, that if the trees were decayed, it might be done by the court. But for me to suppose the testator meant that the trees should stand till they were decayed, and then be cut for the tenant for life, is to suppose him to mean an injury to his devisees and the public, which is against reason.

I am of opinion that I ought to preserve the power and the check, and therefore let it be referred to see what timber and wood is mature and fit to be cut, and let the same from time to time be felled for the benefit of the respective tenants for life, with the approbation of the master (a).

(a) *Vide Inwood v. Twyne, ante, 148, and the cases cited in the note to it.*

SCRIVEN v. TAPLEY.

15th Dec. 1763.  
8th July, 1765.

S. C.

*Et è contra.*

Amb. 509.  
Serjt. Hill, MSS.

(*Reg. Lib. B. 1764. fol. 433.*)

By indentures of lease and release, bearing date the 8th and 9th of *August*, 1693, *Thomas Surpitch*, in consideration of the sum of £640, the portion of *Elizabeth* his intended wife, settled lands on himself for life, remainder to her for her jointure, &c. and created a term of 100 years, to raise the sum of £300 as portions for young children, payable at twenty-one, &c.

The equity of compelling the husband to make a settlement out of the wife's estate, does not survive to the children, but is personal to her.

*Mary Surpitch*, the only younger child of that marriage, married *Edward Tapley*. No portion whatever was advanced on her marriage, and she died, leaving the plaintiff *Mary*, the wife of the plaintiff *Scriven*, her only child.

This was a bill to have the above sum of £300 raised, and interest paid from the time the plaintiff's mother, *Mary Tapley*, attained her age of twenty-one. The cause coming on to be heard at the *Rolls*, his Honour was (amongst other things) pleased to order and declare, that the said estate was subject to the payment of the said sum of £300, and that *Edward Tapley* became entitled to the said sum of £300, subject to the equity of making a provision for the said *Mary Scriven*, his daughter. This was an appeal from so much of the above decree.

Mr. *Sewell* and Mr. *Jones* for the plaintiffs; Mr. *Willes* and Mr. *Bicknell* for the defendants.

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The equity of compelling settlements first arose upon the husband's coming into this court for assistance. It is personal to the wife, and if carried further, would be attended with ill consequences to creditors. There is no case where the court has refused assistance to the husband, after the death of the wife, upon the terms of his making a provision for the children.

Decree reversed as to that part (a).

(a) It has been thought that Sir *T. Sewell* (notwithstanding the above reversal of Sir *T. Clarke's* decree) in the case of *Cockel v. Phipps*, 1 *Dick.* 391, which occurred shortly afterwards, acted in direct contradiction to Lord *Northington's* opinion. It appears, however, from the very elaborate judgment of Sir *T. Plumer* in *Lloyd v. Williams*, 1 *Mad. Rep.* 450, that the case has been erroneously reported, and that it does not bear upon the present question. In *Murray v. Lord Elibank*, 10 *Ves.* 84, and particularly in the above cited case of *Lloyd v. Williams*, all the previous cases were commented upon, and it is now fully settled, that the children have no equity after the death of the mother, unless there has been a contract, or a decree for a settlement in her life-time, and that she may at any time before the execution of the settlement, by consent in court, waive it and defeat the children. But it is not necessary that an actual settlement should have been made, in order to give title to the children: if there be a decree referring it to the Master to approve of a settlement, and the wife die before any proceeding under it, the settlement must still be made for the children. *Rowe v. Jackson*, 2 *Dick.* 604. *Murray v. Lord Elibank*, cit. sup. *Martin v. Martin*, cit. 10 *Ves.* 89. And it has even been decided that the equity attaches at the *filing of the bill*, whether filed by the wife or others; and accordingly, children were held entitled to the benefit of the equity attaching upon a bill filed by an executor, though

the wife died before answer. 20. *Beresford v. Hobson*, 1 *Steinmetz v. Halthin*, 1 G. & *Mad. Rep.* 362. *Ex parte J.* 64. As to the mode of estimating the allowance to be made to the wife, and the proportions usually assigned, *Eden's Bankrupt Law*, 2d Ed. 249. *vide Wright v. Morley*, 11 *Ves.*

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GREY v. MANNOCK.

(*Reg. Lib. A.* 1764. *fol.* 451.)

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8th July, 1765.  
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cit. 6 T. R. 292.

*GEORGE YATES* being entitled under a lease for three lives from the bishop of *Winchester*, by indentures of lease and release, bearing date the 29th and 30th of *December*, 1703, in consideration of a marriage between *Francis Mannock*, son and heir of *Sir William Mannock*, and *Frances Yates*, his daughter, conveyed the said premises to trustees and their heirs during the said lives in trust for the said *George Yates* for life; remainder to *Frances* the wife of the said *George Yates*, to secure £60; remainder to the said *Frances*, his daughter, for life; remainder to the said *Francis Mannock* for life; remainder to his first and other sons successively in tail male; remainder to his daughters as tenants in common; remainder in trust for the right heirs of the said *George Yates*.

*Quasi tenant in tail of a freehold lease for lives may, by surrendering the old lease, and taking a new one to himself, bar the remainders over.*

On the marriage of *William* the eldest son of the said marriage, with *Theresa*, sister of the plaintiff *Wright*, by indentures of lease and release, bearing date the 2d and 3d of *September*, 1734, reciting the indentures of the 29th and 30th of *December*, 1703, and that the said *Sir Francis Mannock* had obtained a new lease for the lives

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of himself and his wife, and the said *William*, their eldest son; it was declared and agreed that certain trustees therein named, should be seised of the said leasehold premises in trust for the said Dame *Frances* for her life; remainder to the said Sir *Francis* for life; remainder to the said *William* for life; remainder to his first and other sons in tail male with remainders over.

[ 340 ]      On the death of Sir *Francis* a new lease was obtained for the lives of Dame *Frances*, Sir *William*, and *Audrey* his sister.

By indenture, bearing date the 19th of *April*, 1760, reciting the settlement of the 2d and 3d of *September*, 1734, and reciting that Sir *William Mannoock* was seised of the said leasehold premises of and in an estate of descendible freehold, the said Sir *William Mannoock* covenanted to levy unto *John Hewit* and his heirs, a fine *sur concessit* of the said leasehold premises, to hold to the said *John Hewit*, his heirs and assigns, for the said lives, the uses of which fine were declared to enure to the said Sir *William Mannoock*, his heirs and assigns.

A fine *sur concessit* was accordingly levied in *Trin. Term*, 1760 (a). Dame *Frances* died in 1761. Upon her death, Sir *William* surrendered the old lease, and took a new one for fresh lives, and by his will, bearing date the 1st of *January*, 1762, devised the premises to the plaintiffs upon trust, to sell, &c.

(a) Lord *Kenyon*, in reading his note of this case in *Doe v. Luxton*, 6 T. R. 292, observed, that this fine had no other effect than any other act *inter vivos*, and supposed that it had been levied in this case in conformity to what was done in the Duke of *Grafton* v. *Hanmer*, 3 P. W. 266, n. though the same reason, he said, did not apply. It seems correctly observed, however, by the learned reporter, that in the latter case the fine was necessary in consequence of the Duchess of *Grafton* having married again.

A contract of sale having been entered into with the defendant *Peter Holford*, the present bill was filed for a specific performance.

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*The Lord* CHANCELLOR.

This is a descendible freehold, not intailable within the statute *de donis*, and therefore no common recovery could be suffered of it: but the person who would have been tenant in tail, had it been an inheritance, is entitled to the absolute ownership. It is like the case at common law of a conditional fee, which became absolute by the party's having issue.

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Decree the bill of Sir *William Mannoek* well proved; and that the trusts must be performed, that the trustees are capable of making a good title, and that the contract must be carried into execution.

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Lord *Kenyon*, to his note of this case above alluded to, had added, that his lordship seemed to be of opinion that Sir *F. Mannoek* might have defeated the remainders by his will alone. To this latter part Lord *Kenyon* stated that he had added a quære: that at that time he was young in the profession, and had generally understood that the remainders in such an estate could only be defeated by some act *inter vivos*; but on further consideration (though he desired to be understood as not deciding any thing on the point), his lordship said, "that he was not sure that the first taker might not destroy them by his will." The opinion contained in this *dictum* has been entirely exploded in subsequent cases. *Blake v. Blake*, 3 P. W. 10. n. & cit. 1 Sch. & Lef. 294. *Campbell v. Sandys*, 1 Sch. & Lef. 281. *Dillon v. Dillon*, 1 Ba. & Be. 77. *Blake v. Luston*, Coop. Rep. 178. In the above cited case of *Campbell v. Sandys*, Lord *Redesdale* observed, that it was on



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principle impossible that a will could have that effect. "A will, so far as it is a disposition of property, is a designation of a special heir against the right of the person to whom the property would otherwise come, by what might be called a devolution of law: but that cannot have the effect of de-

priving of a right a person who does not claim by devolution of law, but by virtue of a preceding gift or instrument."

With respect to the general powers of a *quasi* tenant in tail to bar remainders over by deed during his life, *vide Fearne's C. R.* 495, *et seq.*

7th Dec. 1765.  
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 Cit. 1 *H. Bl.* 33.

MOOR v. HAWKINS.

(*Reg. Lib.* 1765. fol. 91.)

Contingent and executory estates, and possibilities accompanied with an interest, are devisable.

*JAMES GRUBB*, by his will, bearing date the 11th of *February*, 1757, devised all his real and personal estate to trustees for his son, *James Grubb*, until he should attain the age of twenty-one; and if his said son should die under his age of twenty-one without issue of his body lawfully to be begotten, then the said testator's will was, that all his lands, tenements, hereditaments and premises should come to *Nicholas Cockram*, his heirs and assigns.

*Nicholas Cockram*, by his will, bearing date the 12th of *December*, 1760, after giving a leasehold tenement, and several specific and pecuniary legacies, devised the residue of all his lands and tenements whatsoever that he should die seised of in possession, reversion, or remainder, to the plaintiff, *Moor*, and the heirs of his body on the body of the plaintiff, *Alice Moor*, his wife, to be be-

gotten, and their heirs in fee; and bequeathed all other his personal estate to the plaintiff, *Moor*.

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*Cockram* soon afterwards died in the lifetime of *James Grubb*, the son, who also died an infant, and without issue, on the 19th of *February*, 1762. The plaintiff and his wife claimed the freehold, and leaschold, and chattel, and personal estate unadministered of the testator *James Grubb*.

*The Lord* CHANCELLOR.

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I never had a doubt, since I was twenty-five years old, that these contingent remainders are devisable, notwithstanding some old authorities to the contrary. In the case of *Selwin v. Selwin* (a), however, I sent the question into the Court of *King's Bench* for the satisfaction of the parties; and the certificate of the judges in that case implied, I think, that they agreed with me in my opinion.

The *Solicitor-General* and Mr. *Skynner*, for the defendant, declined any further argument.

*The Lord* CHANCELLOR.

This argument is very properly withdrawn, as the point is settled and ought not to be shaken. It is a liberal and right determination.

Declare the real and personal estate of the said testator, *James Grubb*, passed by his said will to the said *Nicholas Cockram*, &c.; and that the real and personal estate of the said *Nicholas Cockram* therein being comprehended, the real and personal estate of the said *James Grubb* passed by his said will to the plaintiff *Thomas Moor*.

(a) *Burr*. 1131.

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These determinations have followed in *Roe v. Griffiths*, since been approved of and 1 *Bl. Rep.* 605. *Roe v. Jones*,

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1 *H. Bl.* 30. *Jones v. Roe*, gent remainder in fee to the survivor, it was considered to be such a contingent remainder as was not devisable. *Doe v. Tomkinson*, 2 *M. & S.* 165. *et vide Fearn*, C. R. 371.

3 *East*, 88. In all these cases the person who was to take was apparent; but where there were two tenants in common for life, with a contin-

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10th Dec. 1765.  
 29th & 31st Jan.  
 & 3d Feb. 1766.  
*S. C.*  
*Amb.* 515.

CORDWELL v. MACKRILL.

(*Reg. Lib. A.* 1765. fol. 297.)

Where articles were entered into previous to marriage, for settling by the wife's father lands to the use of the husband and wife for their lives, and the life of the survivor, and after the death of the survivor, to the use of the heirs of the body of the husband on the wife, remainder over; and a settlement was made after the marriage reciting the articles, and said to be made in pursuance of the marriage; upon a bill brought by a son of the marriage, the court refused to decree the articles to be carried into execution by a strict settlement against a purchaser for a valuable consideration, who had notice of them; on the ground of the articles not being produced by which alone the court could alter the settlement.

*ROBERT MARTIN*, on the marriage of his daughter *Mary* with *William Cordwell*, the grandfather of the plaintiff, by articles bearing date the 6th of *February*, 1726, in consideration of the said intended marriage, and of natural love and affection, covenanted to convey certain premises in the county of *Kent*, in trust, for and to the use of the said *William Cordwell*, and *Mary* his wife, for their lives, and the life of the survivor; and after the decease of the said *William Cordwell*, and *Mary* his wife, and the longest liver, to the use of the heirs of the body of the said *William Cordwell* on the said *Mary* begotten, and their heirs for ever; and for want of such issue, to the use of such persons and for such estates as the said *Robert Martin* should by deed or will appoint; and in default of appointment, to the use of the right heirs of the said *Robert Martin*.

The marriage having taken place, by indenture of lease and release, bearing date the 16th and 17th of *September*, 1728, reciting the said articles, and that the said

settlement was made in consideration of the said marriage, and in pursuance and performance of the said articles, the said *Robert Martin* conveyed the said estates to the said *William Cordwell* and *Mary* his wife, for their lives, and the life of the longest liver of them ; and after their death, to the use of the heirs of the body of the said *William Cordwell* on *Mary* his wife, and their heirs for ever, with remainder as the said *Robert Martin* should appoint ; and in default of appointment to the right heirs of the said *Robert Martin*.

In *Michaelmas* term, 1728, *Cordwell* and his wife levied a fine of the said premises to such uses as they should jointly appoint, and in default of appointment, to the uses of the settlement ; and afterwards made several mortgages of the premises which were assigned to, or in trust, for the defendant, *Thomas Mackrill*.

By articles of agreement, bearing date the 12th of *August*, 1732, reciting the said marriage articles and settlement, the said *William Cordwell* and *Mary* his wife, in consideration of the sum of £7500, to be paid to them by the said *Thomas Mackrill*, agreed to convey the said premises to him in fee. *Cordwell* having afterwards become a bankrupt, *Kemp*, his assignee, entered into articles, bearing date the 6th of *May*, 1746, for carrying the former articles into execution.

A bill having been brought by *Kemp* and *Cordwell* against *Mackrill* to carry the two agreements into execution, and a cross bill by *Mackrill* to have them cancelled, and to have the estate sold, and to be paid his mortgage money, and the causes coming on to be heard, a decree was made on the 18th of *July*, 1748, that the articles should be performed.

This was a bill by *William Cordwell*, an infant, the son of the said *William Cordwell*, who was now deceased ; and it prayed that the marriage articles of the 26th of

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*February, 1726*, might be carried into execution by a strict settlement.

The *Attorney-General* and Mr. *Willes* for the plaintiff.

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It is by no means a new thing to come into this court to have a settlement rectified by the articles. *Trevor v. Trevor*, 1 Eq. Ab. 387. *Honor v. Honor*, 1 P. W. 123. *West v. Errissey*, 2 P. W. 349. The children being purchasers, this court expounds the articles technically, in order to make a settlement; and in the present case is more peculiarly called upon to do so from the additional words of limitation. The defendant, *Mackrill*, cannot be protected as a purchaser, being affected by notice of the articles and settlement from the recital in the articles of agreement.

The *Solicitor-General* and Mr. *Wedderburne* for the defendant.

This doctrine was never heard of in this court till the year 1720, and was then admitted with very great caution, and never been extended beyond the parties themselves. In *Warwick v. Warwick (a)*, Lord *Hardwicke* said that no case had gone so far as to relieve against purchasers; but it does not appear that such articles ever existed as this court could act upon: it is necessary that they should be proved to have existed, for which purpose the mere recital is insufficient. The words are, "made or mentioned to be made." How would these words operate by estoppel? And this recital is by no means notice to a purchaser.

*The Lord Chancellor.*

The general question is of great extent and consequence, viz. Whether this court will rectify a settlement by reducing an estate tail into an estate for life against a pur-

(a) 3 Atk. 293.

chaser, the settlement having been unimpeached by the plaintiff's father, who, if it had been rectified, would have had an absolute power over the plaintiff's interest? and I am of opinion that he is not entitled to the equity which he prays, and that the bill must be dismissed.

First, because in this case neither the articles are produced, nor a copy of them proved, by which alone I can rectify the settlement. Suppose there are no articles at all, it then comes to the case alluded to in *Collins v. Plummer*, 1 P. W. 106. Nothing appears from this recital that the parties intended a settlement different from the one which they have made: the recital is partial, and words may be omitted which confirm such intent. The true foundation of the jurisdiction of courts of equity in such cases as *Trevor v. Trevor*, and *West v. Errissey*, arose out of the limitation by remainder out of the estate for life, which plainly demonstrated that the children were intended to take as purchasers; and therefore where the settlement was made pursuant to, and in performance of, the articles, that the intent continued the same; and the settlement having been mistaken, was and ought to have been at a proper time, and under proper circumstances, rectified. In these cases, therefore, there was no conjecture; but here it is impossible for me to say that the parties to the articles did not intend the son to have an estate tail (a). And I think that if I were to decree a strict settlement against a purchaser for a valuable consideration, it would make a great confusion in property, and uncertainty in passing titles.

Secondly, as to the notice. The notice is the recital of the articles, which, if they had been just as they are re-

(a) As to the general doctrine upon the subject of rectifying settlements, in order to effectuate the intent

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A purchaser is not bound to take notice of an equity arising out of the mere construction of words which are uncertain, and the meaning of which often depends upon their locality.

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cited, shew no intent at variance with the settlement, and consequently no ground of relief. Besides, the argument supposes that the subject must know equity as well as law; a position which I find no case to warrant, and I will not be the first to make one. A man must, indeed, take notice of a deed on which an equity, supported by precedents, the justice of which every one acknowledges, arises, as in the case of prior incumbrances; but not the mere construction of words, which are uncertain in \* themselves, and the meaning of which often depends upon their locality (a). But I must answer this supposition by another; and I must suppose that the counsel or person who advised upon the title, saw from such entire articles that it was not one of those cases in which this court would relieve.

It would be the most dangerous thing in the world to determine otherwise, unless the whole of the instrument were before me; for the true construction depends on words, and other parts of the deed may be material to find out the true meaning (b). I cannot see any reason to lay it down as an universal rule, that in all cases of articles the husband is to be only tenant for life.

Bill dismissed.

(a) The doctrine upon *Grant*, in *Parker v. Brooke*, 9 *Ves.* 588.

(b) As to constructive notice in general, *vide Howorth v. Deem*, *ante*, Vol. I. p. 351. and the cases cited in the note *ib.* 356.

and approved of by Sir W.

COUNTESS GOWER v. EARL GOWER.

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(Reg. Lib. A. 1765. fol. 163.)

19th Feb. 1766.

**JOHN**, Earl of *Gower*, by his will, dated the 22d of *December*, 1749, (amongst other things) gave to his wife; \* the defendant, Countess Dowager *Gower*, an annuity of £1000 in lieu of dower and to be chargeable on all the lands in his will mentioned, of which the manor and estate of *Grindon* was part. He then devised to trustees and their heirs his manors, lands and hereditaments charged with the said annuity, and subject also to the payment of several sums of money therein given to his daughter, *Elizabeth*, Countess *Waldegrave*, in trust to sell the same and to apply the money first for payment of debts and incumbrances affecting the estates, and all the just debts he should owe at his death, and which his personal estate would not reach to pay; then to raise and pay £16,000 for the portions of his younger children, and to invest the surplus money (if any) in the purchase of lands, to be settled on his sons and brothers successively in such manner, and with such remainders over as therein mentioned; and he appointed *Mary*, Countess Dowager *Gower*, *Henry Pelham*, *Baptist Leveson Gower*, and *Robert Barber*, executors.

Biddings opened after confirmation of the Master's report upon a considerable advance, there having been a mistake made in a particular of the estate left with the Master; and one of the parties who confirmed the report having been steward of the family, and knowing more than he communicated.

On the 24th of *December*, 1754, the testator died, leaving the plaintiff, the countess, his widow, and the defendant, Earl *Gower*, his eldest son and heir at law, and the defendant, *John Leveson Gower*, his only younger child, who thereupon became entitled to the £16,000 directed to be raised by his father's will.



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In *October* a bill was filed for the purpose of carrying the trusts of this will into execution; and the cause coming on on the 14th of *June*, 1763, it was ordered that the will should be established, and the trusts performed; and the usual accounts were directed. And it was ordered, that in case the personal estate should not be sufficient, that the trust estate remaining unsold, or so much thereof as should be sufficient to satisfy the debts, &c. remaining unpaid, should be sold to the best purchaser, to be allowed of by the Master, and the money applied for that purpose; and it being admitted that the defendant *Earl Gower*, had, out of his own money, paid several of the testator's debts, it was ordered that he should be admitted to stand in the place of such creditors so paid off, and receive a satisfaction for the same out of the testator's estate.

In pursuance of this decree the Master proceeded to take the account directed; and it appearing necessary to sell the trust estates, the Master proceeded to a sale thereof, and (amongst others) of the manor of *Grindon*, in the county of *Stafford*, and of several farms, lands and cottages within the manor; and for the purposes of the sale, a particular of the estate was left with the Master, stating the names of the several tenants, and the annual rents paid by each of them, by which it appeared that they amounted in the whole to £632 8s. 7d. *per annum*.

Under this particular the estate was put up to sale before the Master, on the 17th of *January*, 1765, who, by his report dated that day, certified that the plaintiff, *John Davenport*, was the best bidder for it at £27,500. But on the 19th of *February* following, and before the Master's report was confirmed, an order was made (on the application of one *Thomas Bell*, who offered to give £28,300 for the estates, being £800 more), to refer it back to the Master to allow of a better purchaser; and

the person who should be allowed the best bidder by the Master's next report, was to deposit £1500 in the Bank, subject to the order of the court.

On the 22d of *April*, 1765, the estate was again put up to sale before the Master, when *Thomas Mytton*, on behalf of the defendant *Ryder*, having bid £28,500 the Master, by his report dated that day, certified Mr. *Mytton*, on behalf of Mr. *Ryder*, to be the best bidder at £28,500.

This report was confirmed, unless cause by an order, dated the 13th of *April*, 1765; and no cause being shewn, the order was on the 13th of *May* following made absolute; and on the 13th of *August*, 1765, Mr. *Ryder*, the purchaser, paid the £1500 into the Bank as a deposit, pursuant to the directions of the order of the 19th of *February*.

After the last-mentioned order was made, the parties interested in the estates discovered that their agents were mistaken as to the value of it, by having relied upon an old survey, wherein they had been valued at the above-mentioned sum of £632 8s. 7d. *per annum*; but that they were worth, to be let, double the rent mentioned in that survey from whence the particular was prepared.

An offer of £2000 more for the estate than Mr. *Ryder* had given having been made by Mr. *Beaumont*, this was a motion on the part of Earl *Gower* and Lord *Trentham* that the £1500 paid into the Bank by Mr. *Ryder* as a deposit might be paid back to him, with interest at £4 *per cent.* from the time the said was paid, and that it might be referred back to the Master to approve of a better purchaser.

In support of the application several affidavits were read. By the affidavit of *William Bill*, it appeared that the particular left with the Master, before whom the estate was put up to be sold, was made from a map or particular

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taken by the order of *John*, late Earl of *Gower*, upwards of thirty years ago, and that he delivered the original map to the defendant, *John Davenport*. And by the affidavit of the others, it appeared that they were well acquainted with the several farms, lands, grounds, mill, and premises at *Grindon*, advertised to be sold under the decree, in the several holdings of *Simon Fletcher*, and forty-five other persons, all named in the affidavit and in the particular left with the Master; as also with the several cottages in the parish of *Grindon*, with the manor or lordship of *Grindon*, in the holding of six persons in the affidavit named; and that there were several cottages or encroachments, part of the manor and estate, not mentioned or taken notice of in the particular of sale left with the Master, and which were in the holding of *Richard Amables*, and twenty other persons named in the affidavit, which last-mentioned cottages or encroachments (twenty-one in number) were not taken notice of in the particular for sale; and that they had been well informed and believed one part of the estate was then let, or agreed to be let, by the last bidders for the estate, for upwards of £1250 *per ann.* net rent; and the other part, not then set to their knowledge, was, to the best of their judgment and belief, worth to be let by the year at a net sum of £300 and upwards.

On behalf of the bidders affidavits were made by three of the defendants, *Thomas Mytton*, *John Davenport*, and *William Hambleton*, and by one *William Kerkland*. *Mytton* and *Hambleton* said they were purchasers each of a fourth part of the manor and estate of *Grindon*; and that the particular of the estate left with the Master, as they understood and believed, comprehended the whole estate of *John*, late Earl *Gower*, at *Grindon*, except some cottages or encroachments, which, or the greatest part, they believed were, in the course of last summer, levelled

or thrown open by certain freeholders within the manor. That since the report of the sale was made absolute, and the deposit of £1500 paid, they had been at very great trouble and expense. *Mytton* said, that the abstract of the title to the estate was not delivered till the 3d of *December* last; and the objections his counsel made thereto were not removed till lately. That being told in *September* last by *John Davenport*, who was also concerned in the purchase, that he had been informed by *Thomas Gilbert*, esquire, who was principally concerned for *Earl Gower*, that the title of the *Grindon* estate was unexceptionable, and the purchase money much wanted, he set about raising his share; and for that purpose called up from interest a very large sum, and also borrowed on account of the purchase, and had for some time paid interest for a considerable sum of money, which monies he had ready to complete his purchase. *Hambleton* said he had engaged his share of the purchase money, and was ready to pay the same, and should be a great sufferer by paying interest if the purchase was not soon completed. And both *Mytton* and *Hambleton* said, that since the deposit was made, they, and the other parties concerned with them in the purchase, not knowing there was any survey of the estate, procured, at a considerable expense, proper people to survey, measure and plan the whole of the estate comprised in the particular; and verily believed the quantity of land, exclusive of commons, naked rocks, fences, roads, encroachments on the waste liable to be thrown open by the freeholders, and rivers, did not amount to 1800 acres. *Hambleton* said, that the survey taken by the directions of the late *Earl Gower* comprehended every piece, field and close belonging to the earl's estate at *Grindon*, except the encroachments on the waste made since that survey was taken; and that since the estate was contracted for, one, if not two leases of

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considerable value, were determined by the death of tenants who held for their lives. That the tenants having received notice from the defendant, *Baptist Leveson Gower*, to quit their respective farms, and no person on behalf of the *Gower* family offering to let the estate, or any part thereof; and the rest of the purchasers intending to pay their purchase money, and move to be let into possession from *Lady-day* next, they did, about *Christmas* last, make conditional agreements for part of the estate, to prevent the same from being untenanted: that the survey of the estate had not been taken, nor had he or the rest of the purchasers concerned themselves in the management of the estate, till possession had been obtained from the court, had they not met with the countenance and assistance of the *Gower* family.

*Davenport* by his affidavit said, that *Ryder* was a trustee for him and *Mytton*, *Hambleton*, and *Taylor*; and that some time after the report was made absolute, and the deposit made, he was well informed that several of the tenants publicly declared they would continue on their respective farms one year after the purchasers were let into possession; and were determined to plough a large quantity of the lands in their respective holdings, which would have injured them very much, as they were lands more properly adapted to pasturage and grazing; that thereupon he applied to *Thomas Gilbert*, principal agent for Earl *Gower*, for his advice and assistance how to act, who promised to do all in his power to assist him in quieting the tenants, and forwarding him in the purchase; and for that purpose particular notices to every tenant to quit on *Lady-day* next were signed by the defendant, *Baptist Leveson Gower*, under the direction of Mr. *Gilbert*.

The *Solicitor-General*, Mr. *Skynner*, and Mr. *Maddocks*, in support of the motion, contended, that it was the common practice of the court to open biddings after.

the report had been confirmed, where sufficient grounds were laid for its interposition : that the mistake of the agents in the present case was a sufficient inducement. They cited *Price v. Moxon* (a), *June, 1754*; *Hooper v. Jewell, 1758*, at the *Rolls*, and mentioned a case on the sale of Lord *Yarmouth's* estate, where the biddings were opened after the reports were confirmed, upon an advance of price only.

Mr. *Willes* and Mr. *Perryn* for the purchasers.

It is a general rule that scarcely admits of exception, that when persons are reported the best purchasers, they are not to be discharged unless there appear to have been circumstances of fraud attending the sale, as in *Price v. Moxon*. These defendants are fair, honest, and open purchasers, who have relied upon the practice of the court. The particular under which the estate was sold was made with great care and attention, under the direction of Lord *Gower's* agents. If in the present case there had been an agreement signed by the parties, a court of equity would have compelled a specific performance, though a greater sum might afterwards be obtained for the estate. The case of an agreement is not stronger than that of a report absolutely confirmed. The payment to us of interest at *£4 per cent. &c.* will be no satisfaction or reparation for the loss and disappointment which will be sustained if the purchase be discharged. The credit of future sales to be made under the authority of this court is greatly involved in the present question.

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(a) In this case the purchaser was partner with the solicitor in the cause, and from some particular knowledge he had, to the benefit of which the other parties were entitled, the sale was set aside; besides the party who came to open the biddings was misinformed as to the time of confirming the report. 2 *Ves. jun. 54.*

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If biddings are to be frequently opened, persons will be discouraged from buying at all under decrees which would be productive of great mischief to creditors, on whose behalf these sales are usually directed.

The *Attorney-General* and Sir *Anthony Abdy* for *Lady Gower*.

*Mr. Hoskins* for *Mr. Beaumont*.

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The *Lord Chancellor* said, that in all cases of this sort, a mere advance of price was not alone sufficient to open the biddings. And that the court would be very careful in exercising this jurisdiction upon mere circumstances of neglect or surprise. That a considerable increase of price was a strong argument when coupled with other circumstances ; what he principally relied on, however, was the manner in which the survey had been made, upon which the particular of the estate was founded. He considered that the situation in which the defendant *Davenport* stood, with respect to the family, was such as to throw considerable suspicion upon the transaction ; that upon the whole, though none of the circumstances were sufficient of themselves to annul the transaction, yet he thought that he should be exercising a wise discretion in opening the biddings.

It was accordingly ordered that the £1500, paid by *Mr. Ryder*, should be repaid him with interest at £4 *per cent.* together with all costs, charges, and expenses that he had been put to ; and that upon payment thereof, he should be discharged from his purchase : that *Lord Gower* should be a creditor on the estate for what he should pay for opening the bidding, and the counsel for *Mr. Beaumont* bidding £2000 more for the estate, it was referred back to the Master to approve a proper purchaser, &c.

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This order was afterwards affirmed in the *House of*

*Lords*, 8th May, 1766 (6 Bro. P. C. Ed. Toml. 306.) After the biddings were opened, those who opened them bid again, and ultimately gave £38,000; after the second sale £2000 more was offered by those who appealed from the former order; which offer was strongly supported by the creditors. But Lord Camden, as it was simply an offer of more money, refused to open it again (2 Ves. jun. 54.)

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Upon the determination in this case, Lord Thurlow, in *Prideaux v. Prideaux*, 1 Bro. C. C. 287, and *Scott v. Nesbit*, 3 Bro. C. C. 475, formed the rule, that after the confirmation of the report, unless there is some misconduct on the part of the individual who has the benefit of the confirmation, the court will not open biddings upon negligence, surprise, or circumstances of that kind. In *Watson v. Birch*, 4 Bro. C. C. 171, and 2 Ves. jun. 51, this doctrine was departed from by the Lords Commissioners, but the orders made on that occasion have been repeatedly disapproved of. *Morice v. the Bishop of Durham*, 11 Ves. 57. *White v. Wilson*, 14 Ves. 151.

As to the opening of biddings before confirmation of the report, vide *Watts v. Mar-*

*tin*, 4 Bro. C. C. 113. *Upton v. Lord Ferrers*, 4 Ves. 700. *Chetham v. Grugeon*, 5 Ves. 86. *Tait v. Lord Northwick*, ib. 655. *Rigby v. Macnamara*, 6 Ves. 117. *Andrens v. Emerson*, 7 Ves. 420. *Brooks v. Snaith*, 3 V. & B. 144. *Ex parte Partington*, 1 B. and B. 209. *Farlow v. Weildon*, 4 Mad. 460. *Garstone v. Edwards*, 1 S. & S. 20. *Brookfield v. Bradley*, ib. 23. *Vansittart v. Collier*, 2 S. & S. 608, by which the old rule of accepting an advance of 10l. per cent. is abolished. That a person present at the sale shall be allowed to open, vide *Barker v. Preston*, 16 Ves. 140. *Thornhill v. Thornhill*, 2 J. & W. 347. *Tyndale v. Warre*, 1 Jac. 525, overruling *M'Culloch v. Cotbach*, 3 Mad. 314.

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## CHENEY v. HALL.

(Reg. Lib. A. 1765. fol. 256.)

Where a father was tenant for life, with remainder to his son in tail, who, on his marriage, by lease and release, conveys his estate to trustees in strict settlement; and some time afterwards joins with his father in making a mortgage of the same estate, and suffers a recovery to the use of the mortgage: held, that the recovery shall notwithstanding enure first to the uses of the marriage settlement.

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GERARD WALKER, by his marriage settlement, bearing date the 15th and 16th November, 1706, conveyed all his real estate in the county of Derby to the use of himself for life; remainder, as to part, to his wife for life, for her jointure; remainder, as to the whole, to trustees for a term of 500 years, for raising portions; remainder to the first and other sons of the marriage, with remainders over. There was issue of the above marriage, Gerard, the eldest son, and four other children.

\*In 1793, Gerard, the son, upon his marriage, conveyed part of the said estate by indentures of lease and release, bearing date the 20th and 21st of February, 1733, to the use of himself for life; remainder to his intended wife for her life; remainder to the heirs of the body of the wife; remainder to his own right heirs.

By indenture, bearing date the 11th of April, 1746, the father and son mortgaged the premises to Henry Peach for 1000 years to secure £300, and in Easter term, 1746, suffered a common recovery, and declared the uses to the mortgage, and then to the father for life, with remainder to the son in fee.

In 1749 Henry Peach purchased the reversion of Gerard, the son, and took a conveyance, bearing date the 25th of November, 1749, to himself in fee.

In 1751 Gerard Walker, the son, died, leaving a widow and the defendant, Gerard Walker, his eldest son, and several other children. Afterwards Walker the father died in 1756, leaving a widow, who was still alive.

The term created under the settlement of 1706 for raising portions being still outstanding, the present bill was brought by the plaintiffs, who claimed under *Peach* the purchaser, to be let into possession of the premises not in jointure to the father's widow; and for an account of the rents and profits from the death of *Gerard Walker*, the father, upon paying the money due upon the portions.

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The defendants, the widow and son of *Gerard Walker* the younger, insisted by their answers that the settlement of 1733 was a bar to the relief prayed, so far as the estate comprised in that settlement was intended to be affected by it.

The question was, whether the common recovery in 1746 should enure to the uses of the settlement of 1733.

Mr. *Hoskins* and Mr. *Ambler*, for the plaintiffs, took a distinction between the case where a tenant in tail conveys to uses, which may take effect in his lifetime, and where they cannot take effect till after his death. In the former case a common recovery, suffered afterwards, shall enure to the uses of the conveyance, though the common recovery is declared, at the time of suffering it, to be to other uses. But in the latter case it shall not, because the uses to take effect, after the death of the tenant in tail, are void in law. *Machell v. Clerk*, Com. Rep. 119. 2 *Salk.* 619.

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The *Solicitor-General* and Mr. *Madocks* for the defendants.

*The Lord Chancellor.*

I am clearly of opinion that the common recovery enured to the uses of the settlement of 1733, and I think the case of *Machell v. Clerk* is clearly distinguishable from the present. There the tenant in tail covenanted to stand seised to the use of himself for life, with remainder

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to his son in tail. The covenant, as to the estate for life to himself, is no avail; for he is in of the old estate; and the covenant to stand seised to uses, after his death, is void, it not being by way of remainder. But in this case there is a conveyance and transmutation of possession, and the remainders are not void.

Bill, as against the defendants, the widow and son of *Gerard Walker* the younger, dismissed.

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*Vide Goodright v. Mead*, 186, & seq. 5 *Cruise Dig.* 486.  
*Burr.* 1703. *Moody v. Moody*, 1 *Prest.* on Conv. 21.  
*Amb.* 649. *Sand.* on Uses,

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 S. C.  
*Amb.* 528.

*5 C. R. D. 264.*

DIXON v. METCALFE.

(*Reg. Lib. A.* 1765. fol. 161.)

The incumbent of the mother-church has the right of nominating to chapels of ease, and can only lose that right by agreement between patron, parson, and ordinary, and on a compensation made to him; and therefore, where a chapel was

erected and endowed by a grant of lands from the lord and freeholders of a manor, and the right of nomination was given by the archbishop in his deed of consecration to the inhabitants, and the vicar of the mother-church declared at the time that he had no right to nominate, and the inhabitants had repaired and nominated for 90 years, yet it was held, that the vicar was entitled to nominate.

It appeared by the bill, and the evidence which was read for the plaintiff, that in the parish of *Leeds*, in *Yorkshire*, which is very large and extensive, there are nine townships, *inter alia*, the township of *Armley*, and another distinct township called *Wortley*; that there are also eight chapels of ease within the parish, one of which, called *Armley Chapel*, was built in the time of the usurpation, and was for some time used as a conventicle; but that there was no certain account at whose expense, or the exact time when it was built. The plaintiff, how-

ever, entered into general evidence, that it had been built by the inhabitants of *Armley* and *Wortley*.

By indenture, dated 6th of *November*, 1653, and made between *Miles Stapleton*, described as lord of the manor of *Armley*, and *Mary* his wife of the first part, and several persons therein named and described to be inhabitants and freeholders of the said manor of the second part, and certain trustees of the third part; after reciting that the inhabitants within the township of *Armley* aforesaid, being far distant from the parish church of *Leeds*, and it being conceived requisite that a comfortable maintenance should be raised and provided for the better encouragement of a godly minister of the gospel, to officiate at the chapel of *Armley*, out of the common and waste grounds within and belonging to the said manor then inclosed and to be inclosed for that purpose, the lord and freeholders, to the intent that the yearly sum of £27 might be issuing forth out of the common and waste ground to the use of a minister there to officiate, and to his successors for ever, granted to the trustees and their heirs certain parcels of common therein mentioned, in trust, to employ the profits thereof to the use of the said chapel, and for payment of the annual sum of £27 to the minister officiating there from time to time.

By another indenture, dated the 14th of *October*, 1657, and made between *Miles Stapleton*, described as lord of the manor of *Armley*, and his wife of the first part, several persons therein named and described to be inhabitants and freeholders of the said manor of the second part, and certain trustees of the third part, the lord and freeholders of the manor granted unto the trustees the land whereon the chapel then stood, with a rood of land thereto adjoining, and a way for persons resorting to the chapel, to the intent that the chapel should for

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ever be used as a chapel, and as a place for the minister of *Armley* and his successors to officiate. And it was agreed that the seats and pews built, and to be built, should be employed for the maintenance of the minister, except two pews belonging to *Miles Stapleton* and *Mary* his wife, which should be free from paying to the minister, in regard they had given the land on which the chapel stood.

In 1674, upon the petition of the inhabitants of *Armley* and *Wortley*, the Archbishop of *York* consecrated the chapel, and in the instrument of consecration took upon himself to grant the nomination of a minister to officiate there, to the inhabitants of *Armley* and *Wortley*, and reserved to himself and his successors the right of lapse. It appeared in evidence that the vicar of *Leeds* was present at the consecration by the archbishop, and declared, that he, as vicar, had no right to nominate a curate to the chapel. The inhabitants of *Armley* and *Wortley*, from the time of the consecration, always repaired the chapel at their own expense, and had elected the minister or curate who was to officiate there, as often as a vacancy had happened, which was four times since the consecration, and the minister so elected had been constantly licensed and officiated.

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On the 25th of *April*, 1761, the chapel became vacant by the death of the last curate, and on the 4th of *May* following the inhabitants met, and elected the plaintiff, and soon afterwards *Kershaw*, the vicar of the mother-church of *Leeds*, nominated and appointed *Metcalfe* to be curate of the chapel. They were both presented to the archbishop, and each requested a licence to preach in the chapel, which he refused to grant till the right was determined.

Upon this the plaintiff instituted a suit in the archbishop's court against the defendant *Metcalfe*, setting up

his right under the election ; but *Metcalfe*, having put in his answer, he abandoned it, and applied to the court of *King's Bench* for a prohibition, which he obtained upon a suggestion of a prescriptive right in the inhabitants to elect a curate to the chapel : he afterwards abandoned that suit, and filed the present bill to have his right under the election established, and for an injunction to stay proceedings in the spiritual court and at law. The defendants *Metcalfe* and *Kershaw* insisted by their answers upon the general right of the rector or vicar of the mother-church to nominate a minister to a chapel of ease, unless he is divested of it by a proper agreement entered into between the patron, parson, and ordinary ; and that no such agreement was entered into in the present case.

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The *Attorney-General*, Mr. *Yorke*, Mr. *Wedderburne*, Mr. *Lee*, and Mr. *Perry* for the plaintiff.

The inhabitants are entitled to the nomination for many reasons. 1st. They must be considered as the founders and endowers of the chapel. The right of presentation of patrons to advowsons arises upon founding and endowing the church. The same reason holds with respect to chapels of ease, and Dr. *Kennett*, in his *Parochial Antiquities*, p. 589, observes, “ at other times the lord of the manor did present a fit person to the appropriators, who, without delay, were to give admission to the person so presented.” 2dly. Under the instrument of consecration ; which, if it does not give them a right, is at least evidence of a right—*Fanshaw v. Rotherham* (a) ; and this is confirmed by the declaration of the vicar of *Leeds* at the time of the consecration. 3dly. The inhabitants have been at the sole expense of keeping the chapel in repair. There has been no contribution from the parish at large, and therefore, as they have borne the

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(a) *Ante*, Vol. I. p. 276.

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burthen, they ought to be allowed to retain the privilege. 4thly. The inhabitants are entitled to the nomination upon the usage. They have for ninety years elected a curate upon every vacancy. This is evidence of an original right in the inhabitants, or, if not, yet it raises a presumption that an agreement was entered into between them and the patron and parson of the mother-church, and the ordinary, by which the inhabitants legally and duly acquired the right. A prohibition was granted in the court of *King's Bench*, which could only have been so upon a suggestion of prescription.

The only remedy which the plaintiff has is in a court of equity; he has none either in the ecclesiastical court or at law. The jurisdiction of the ecclesiastical court is defective: it cannot judge upon the circumstances of this case, which can only be determined in a temporal court; nor has the plaintiff any remedy at law; a *quare impedit* will not lie in case of an election or nomination by inhabitants. A court of equity only can judge upon all the circumstances of the case, and can direct a trial at law, if necessary, upon an issue adapted to the merits of the case. The case of *Herbert v. the Dean and Chapter of Westminster*, 1 P. W. 773, shews that a court of equity will determine upon this question.

Mr. *Ambler* and Mr. *Price*, for the defendants, were stopped by the court.

*The Lord* CHANCELLOR.

I shall dismiss this bill for several reasons. First, because the plaintiff has no legal title. Secondly, because he has no equity. Thirdly, because this election is an usurpation upon the vicar.

It is difficult to say who was the endower of this chapel. If there was sufficient waste to approve, the lord of the manor was the endower; but whoever was, it was not

an endowment of a chapel of ease, but of a conventicle in the time of the usurpation. When the times changed, and the restoration took place, the right of nomination was restored to the vicar of the mother church.

It is undoubted law, that whenever a chapel of ease is erected, the incumbent of the mother church is entitled to nominate the minister, unless there is a special agreement to the contrary, which gives a compensation to the incumbent of the mother church : a mere arbitrary agreement between patron, parson and ordinary, without such a compensation, is not to be supported. In the case of prescription, every thing is presumed to have been proper. An agreement with a compensation to the parson is supposed.

There can be no prescription in this case, because the chapel was built in 1657, or very little earlier. The consecration is express as a chapel of ease ; that is sufficient to support the vicar's right to the nomination. Afterwards, in the same instrument, the archbishop gives the nomination to the inhabitants of *Armley* and *Wortley*, which he could not do of his own authority ; and it is observable he gives it to the most improper people, as they were sectaries. There is no pretence in this case of any agreement between patron, parson, and ordinary, either with or without a compensation to the vicar. The declaration of the vicar at the time of the consecration could not bind his successors if it did himself : nothing he could do would have that effect, unless it was by a proper deed under his hand. The nominations to the curacy by the inhabitants are so many instances of usurpation, but it did not take away the right of the succeeding vicar to nominate upon a vacancy.

Bill dismissed.

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*Vide Burn's Eccl. Law, Vol. I. 306, and Vol. II. 57.*

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26th Apr. 1766.

## REYNOUS v. JEFFREYS.

(Reg. Lib. B. 1765. fol. 430.)

Exchequer annuities settled upon the husband and wife for their lives, and after their deaths for the children of the marriage in equal shares, to be assigned and made over to the children at their respective ages of twenty-one years,

happening after the death of the survivor of the husband and wife: if any attained twenty-one in their lives, to be paid, assigned, and made over within three months after the death of the survivor, unless sooner directed; with a proviso for survivorship among the children, if any should die before their shares were payable, &c.; and another, that if there should be no child, or all should die before any of their share should be payable, &c. as aforesaid, then for the husband and wife, and the survivor, and executors, &c. of such survivor: there being only one child who attained twenty-one, but died in the life of the mother, who survived the husband; held, first at the *Rolls*, and afterwards by the Lord Chancellor, that the son's executor, and not the mother's, was entitled to the annuities.

THIS case, in which the Lord Chancellor's decree was afterwards affirmed in the *House of Lords*, is reported very fully in 6 Bro. P. C. 398, Ed. Toml. As the Editor is not in possession of any note of Lord Northington's judgment, he must refer the reader to that account of the

case. It was lately particularly cited and relied upon by Sir W. Grant in his judgment in the case of *Schenck v. Legh*, 9 Ves. 311. The general doctrine upon this subject, and the subsequent cases, are collected in *Cholmondeley v. Meyrick*, ante, Vol. I. 77, and the note to it.

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13th June, 1766.

## WHITE v. CARTER.

(Reg. Lib. B. 1765. fol. 329.)

Devise to trustees of money to be laid out in land and to be

settled as counsel should advise, in trust for A. and his issue in tail male to take in succession and priority, and the interest of the money till laid out to be paid to A., his sons, and issue: held, that A. should only have an estate for life in the lands to be purchased, with remainder to his first and to her sons, &c.


THOMAS WHITE, by his will, bearing date the 3d of October, 1754, gave and bequeathed to trustees, and the

survivors or survivor of them, all his personal estate of what nature or kind soever, charged with the payment of all his debts, legacies, and funeral expenses, upon trust, that they the said trustees, and the survivors or survivor of them, and the executors and administrators of such survivor, should lay out and dispose of the same in a purchase or purchases of land, to be settled and assured as counsel should advise, unto and upon the said trustees and their heirs upon trust, and to and for the use of the plaintiff and his issue in tail male, to take in succession and priority of birth ; and for default of such issue male, then upon further trust to and for the use of the said testator's niece, the defendant *Ann Robertson*, and the heirs male of her body, to take in succession and priority of birth ; and for default of such issue male, then upon further trust to and for the use of the testator's own right heirs for ever. And after deducting the costs and expenses of the said trust, to be paid out of the dividends, interest, and profits, the testator ordered his trustees to pay and apply the remainder of the interest, dividends, and profits, until the said purchase or purchases should be made, unto the plaintiff, and the defendant *Ann Robertson*, respectively, and unto their respective sons and issue male, who should be respectively entitled to the rents and profits of the freehold and copyhold estates, when purchased by virtue of the limitations aforesaid, or as near as the same might be, and the nature of a chattel interest would permit.

This was a bill to carry the trusts of the will into execution, and for the opinion of the court, whether the lands to be purchased should be settled upon the plaintiff as tenant in tail, or in strict settlement.

The *Attorney-General* and Mr. *Madocks* for the plaintiff.

This is a case in which the rule must take effect. Lord

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*Hardwicke's* determination, as well as his observations in *Garth v. Baldwin* (a), are strongly in point to the present case. He there said, that he would not overrule the legal construction, unless the intent of the testator plainly appeared: in that case it was not plain, and accordingly he decreed a conveyance in tail. In the present case the estate is directed to be settled in tail male on the plaintiff, and the court will not restrain him to an estate for life; which it cannot do without taking away from the legal effect of the words. The words "in succession or priority" will have effect, if the plaintiff takes an estate tail, as well as if he takes only an estate for life. The latter words disposing of the interest of the money, are no more expressive of an estate for life to the plaintiff than the former. In all the other cases in which the court has restrained the construction to an estate for life the intent has been plain. *Papillon v. Voice*, 2 P. W. 471. *Lord Glenorchy v. Bosville*, For. 3. *Bagshaw v. Spencer* (b).

The *Solicitor-General* and Mr. *Wedderburne* for the defendant.

*The Lord CHANCELLOR.*

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This is one of those cases of imperfect trusts which are left to be modelled by this court; and where, according to the expression of Lord *Talbot* in *Lord Glenorchy v. Bosville*, something is left by the creator of the trust to be done: it therefore becomes solely a question of intention. For though the court has no power, where the limitations are expressly declared, to give the words a different sense from what they would bear at law, yet, where its assistance is required to direct the conveyance, it will give that direction according to the intent of the

(a) 2 *Ves.* 646.

(b) 2 *Atk.* 570. 1 *Ves.* 142. 1 *Collect. Jurid.* 378.

testator apparent upon the face of the will, if that intent is not contrary to any rule of law. I think the intention in the present case is very plain to give the plaintiff only an estate for life; the direction to be settled as counsel should advise, and the words "in succession and priority of birth," strongly indicate his intention to have the estate strictly settled, which, I think, is put beyond a doubt by the latter clause, where he makes use of the words "sons and issue."

Declare, that it was the intent of the testator to have the estate, which should be purchased with his money, settled and assured to the use of the plaintiff for life, with remainder, &c.

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This decree was afterwards *Vide Fearne, C. R. 184,* and affirmed by Lord Camden *Wright v. Pearson, ante, Vol. upon a rehearing, Amb. 670. I. 119,* and the note to it.



## **APPENDIX.**

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*Certificate of the Judges respecting the Court Martial  
proposed to be held upon Lord GEORGE SACKVILLE.*

TO THE KING'S MOST EXCELLENT MAJESTY.

MAY IT PLEASE YOUR MAJESTY,

IN obedience to your Majesty's commands, signified to us by a letter from the Right Honourable the Lord Keeper, referring to us the following question, "Whether an officer of the army having been dismissed from his Majesty's service, and having no military employment, is triable by a Court Martial for a military offence lately committed by him while in actual service and pay as an officer?"

We have taken the same into consideration, and see no ground to doubt of the legality of the jurisdiction of a Court Martial in the case put by the above question.

But as the matter may several ways be brought, in due course of law, judicially before some of us by any party affected by that method of trial, if he thinks the court has no jurisdiction; or if the court should refuse to proceed, in case the party thinks they have jurisdiction; we shall be ready, without difficulty, to change our opinion, if we see cause, upon objections that may be then laid before us, though none have occurred to us at present which we think sufficient.



All which is humbly submitted to your Majesty's royal wisdom.

<i>Mansfield.</i>	<i>Rich. Adams.</i>
<i>J. Willes.</i>	<i>H. Bathurst.</i>
<i>T. Parker.</i>	<i>J. E. Wilmot.</i>
<i>T. Denison.</i>	<i>W. Noel.</i>
<i>M. Foster.</i>	<i>Rich. Lloyd (a).</i>
<i>S. S. Smythe.</i>	

3d of March, 1760.

(a) Mr. Justice Clive was absent at York on the circuit.

A similar consultation took place a few years prior to it in the case of Admiral Byng, and another in the reign of George 1st, as to the right of the sovereign to the education and marriage of the children of the Prince of Wales. The proceedings upon the latter of these are in Lord Fortescue's Reports, 401: and more fully in 15 Howell's St. Tr. 1195. The former of these works also contains several early precedents, in which this mode of proceeding has been resorted to, and authorities by which it is justified, p. 386, *et seq.*

Mr. Hargrave, however, in a note to his edition of *Co. Lit.* 110 a. n. 129, has, on the great authority of Lord Coke, expressed serious doubts as to the propriety of these extra-judicial consultations: and, indeed, many of the precedents given in the books are extremely objectionable. As in the instances mentioned by *Kelynge*, 9 & 10, preparatory to the trial of the regicides,

the judges met at the request of the *Attorney-General*, to advise the king not only as to framing the indictments, but in relation to overt acts and evidence, *Fortesc.* 390. So in the case of *Francis Francia*, in 1717, a conference was held among the judges, three of whom who were to try the prisoner, at which the *Attorney* and *Solicitor-General*, who were to conduct the prosecution next day, lent their assistance, *Foster*, 241, *Fortescue*, 390.

Lord Bacon, in a letter to James 1st, gives a curious account of his management in endeavouring, according to the king's direction, to obtain the opinion of the Judges of the *King's Bench* separately and privately, previous to the trial of Mr. *Peackman*, a minister, indicted for certain treasonable passages in an unpublished sermon, and of Lord Coke's honorable reluctance to give the desired answer. *Bacon's Works*, Vol. 4. 595. *Kippis*, *Bio. Brit.* Vol. 3. 682.

It appears also not only from the guarded manner in which the present answer is expressed, but, from Lord *Mansfield's* letter to the Lord *Keeper* in which it was inclosed, and which is here subjoined from the original amongst Lord *Northington's* papers, that the judges felt considerable disinclination to have their opinions called for in this mode. A similar degree of caution was exhibited in a great case which occurred in the reign of Queen *Anne*, in the year 1711. Upon the revival of \*the Arian heresy by *Whiston*, doubts were entertained whether the convocation could in

the first instance proceed against a person for heresy; and the queen, in consequence of an address from the Upper House, took the opinion of the judges. Four of the judges thought that the convocation had no jurisdiction. The remaining eight (who, together with the *Attorney* and *Solicitor-General*, gave their opinions in favour of the jurisdiction, &c.) expressly reserved to themselves a power to change their mind, in case, upon an argument that might be made for a prohibition, they might see cause for it. *Burnet's Own Times*, Vol. III. 325. oct. ed.

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*Letter of Lord MANSFIELD to the Lord KEEPER, enclosing the above Certificate.*

3d March, 1760.

MY LORD,

I laid his Majesty's commands before the judges. They are exceedingly thankful to his Majesty for his tenderness in not sending any question to them till the necessity of such reference became manifest and urgent. They have considered the point, and they all agree. In general, they are very averse to giving extra-judicial opinions, especially where they affect a particular case; but the circumstances of the trial now depending ease us of difficulties upon this occasion, and we have laid in our claim not to be bound by this answer. Mr. *J. Clive* is now at *York* upon the circuit, so that there was no opportunity to have his concurrence.

I have the honour to be,  
&c.

MANSFIELD.

*30 Ch. D. 144.*

*Argument of Lord C. B. PARKER upon the effect of  
Earl FERRERS' Attainder.*

A title of nobility, limited by patent in tail, is an estate tail within the protection of the statute *de donis*, whether it be conferred from any place or not, and consequently not forfeited by an attainder of felony.

3 Sept. 10 *Queen Anne*.—QUEEN ANNE, by letters patent, created *Robert Baron Ferrers of Chartley*, Viscount *Tamworth*, in the county of *Stafford*, to hold to him and the heirs male of his body; and by the same letters patent the Queen created the said Lord *Ferrers* Earl *Ferrers*, to hold to him and the heirs male of his body, with the usual clauses.

29 Nov. 1711.—Earl *Robert* was introduced and took his seat in the *House of Lords* as Earl *Ferrers*; he had issue male, *Robert*, Lord *Tamworth*, his eldest son, who died in his father's life-time, leaving an only daughter, *Elizabeth Shirley*, who married *James*, Lord *Compton*, afterwards Earl of *Northampton*.

25 Decem. 1717.—Earl *Robert* died, leaving issue male three sons, *Washington* Lord *Tamworth*, *Henry Shirley*, and *Lawrence Shirley*; and upon his death the earldom and viscountship descended to *Washington* Lord *Tamworth*; but the barony of *Ferrers* being a barony in fee simple, descended to Lady *Northampton*, and since her death is descended to her daughter, the Lady *Charlotte Compton*, now the wife of the Honourable *George Townshend*, esquire, eldest son and heir apparent of the Lord Viscount *Townshend*.

[ 374 ] 13 July, 1717.—Earl *Washington* took his seat as Earl *Ferrers*, and on the 14th April, 1729, died without leaving any issue male.

21 Jan. 1730.—Upon Earl *Washington's* death his brother, *Henry Shirley*, took his seat as Earl *Ferrers*; and in 1745 Earl *Henry* died without issue.

His younger brother, *Lawrence Shirley*, died in the life-time of Earl *Henry*, leaving five sons, *Lawrence Shirley*, *Washington Shirley*, *Robert Shirley*, *Walter Shirley*, and *Thomas Shirley*.

21 Oct. 1745.—Earl *Lawrence* took his seat as Earl *Ferrers*, and on the 18th of April, 1760, was attainted of felony and murder by his peers in full parliament,

Lord *Henley*, Lord *Keeper*, being Lord High Steward *pro hac vice*; and he was executed on the 5th of *May*, 1760, at *Tyburn*, and died without issue.

I propose to inquire whether the attainder of *Lawrence*, late Earl *Ferrers*, of felony and murder, will have any and what effect upon the claim of his next brother, *Washington Shirley*, to the earldom and viscountship; for it is clear that the barony could not be affected by the attainder, because Earl *Lawrence* never had it.

Peerages in *England* from the Conquest were by tenure of lands and tenements granted by the King's charter, on which he reserved to himself a tenure in chief by common knight's service, or grand serjeanty, or both. Afterwards they were by tenure and writs, or by writs and sitting in parliament, where the persons summoned to parliament had no honorary possessions. And afterwards they were by letters patent of creation, or by writs and sitting in parliament; and though antiquarians have ascertained the particular reigns in which these two last methods of creation had their commencement, I am not sufficiently versed in antiquity to say whether they have fixed upon the true times or not.

All English peerages were anciently inheritances in fee simple, and descended not only to males but to females successively, as they were not partible in their nature; but the particular period of time when limitations of honour to the persons ennobled, and the heirs male of their bodies, were first introduced, seems to be somewhat in the dark; and it is thought that not many honours were entailed before the reign of King *Edward III.*, and yet I find one very old instance (if it may be allowed to be one), even before the statute *de donis*, in a little book called Judge *Dodderidge's* Law of Nobility and Peerage, where, in page 103, it is said, that *Hubert de Burgh* was made Earl of *Kent* in the time of *Henry III.* by these words, *Habendum sibi et hæredibus suis de corpore Margaritæ uxoris suæ, sororis Alexandri Regis Scotiæ, procreatis, et pro defectu talis exitus remanere rectis hæredibus dicti Huberti.*

This is a posthumous work, printed in the year 1658, many years after the death of that learned judge, and so incorrectly that it is not to be depended upon (a).

(a) It is the same work as that which goes by the title of *Bird's Magazine of Honour*.

I however find in *Madox's Bar.* fo. 89, that King *Henry III.* granted the manor of *Knarestorough*, &c. to *Hubert de Burgh* and *Margaret* his wife, and to the heirs descending from the said *Hubert* and *Margaret* to hold of the king and his heirs, during the life of each of them, and after their decease to their heirs descending from the said *Hubert* and *Margaret*, in fee and in inheritance. Mr. *Madox* thought this a grant in fee tail, and his opinion seems to be well founded; for heirs descending from the said *Hubert* and *Margaret* are tantamount to heirs of their bodies, and would exclude collaterals.

And for further satisfaction I applied to Mr. *Rooke*, clerk of the Rolls chapel, and deputy keeper of the records in the Tower, and desired him to search when and how *Hubert de Burgh* was created Earl of *Kent* by King *Henry III.*; which he has done, but cannot find any formal creation of him; but he has found in *Rot. Cart.* 11 H. 3. m. 24. No. 193, that that king granted to him as follows: *Quinquaginta libras sterling annuas pro tertio denario comitatus Kant: nomine com. Kant: de quo comitatu eundem Hubertum comitem fecimus percipiendas annuatim per manus Vic. Kant: ad duos terminos anni vid. ad pasch. £25 et ad festum S. Mich. £25; quare volumus et firmiter præcipimus quod dictus Hubertus comes Kant: et hæredes sui de Margarita uxore sua sorore Alexandri Regis Scotiæ procreati habeant predictas quinquaginta libras sterling de nobis et hæredibus nostris in feodo et hæreditate nomine comitis, et pro tertio denario dicti comitatus Kant: in feodo et hæreditate sicut prædictum est.*

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From these circumstances it seems to be no improbable conjecture, that the earldom of *Kent* was entailed, as well as the estate granted by the king, that they all might have the same duration.

By an attainder of treason or felony the blood of a nobleman is corrupted, and he and his posterity are become ignoble. *Staunford's Pleas of the Crown*, lib. 3. ca. 34. p. 195—6. *Acton's Case*, 4 Co. 118 b. 1 *Inst.* 8 a.

As *Lawrence*, Earl *Ferrers*, succeeded to and enjoyed the earldom and viscountship several years, I think that there can be no doubt but that the corruption of his blood by the attainder would impede the descent of those honours to *Washington Shirley*, his next brother, unless

the statute of *Westm. 2. c. 1.* will preserve them from forfeiture. *Collingwood and Pace, 1 Ventris, 417. 1 H. H. 356, 357.*

It will be therefore proper to consider the words of that statute. It speaks, *de tenementis quæ multoties dantur sub conditione, videlicet, cum aliquis dat terram suam alicui viro, &c.*, and so recites the forms of fees-simple conditional, which now are entails, and then shews two mischiefs; that in all these cases the feoffees, after issue had, had power to alien and disinherit their issue: and also the donors were barred of their reversion; both which being against the mind of the donor and form of the gift, were holden hard.

Therefore the remedy provided is, that the will of the donor (according to the form in the deed of gift expressed) shall be henceforth observed; so that they to whom the *tenement* was given under such conditions shall have no power to alien it, but that it shall remain to their issue after their death, or shall revert to the donor or his heirs, for want of issue.

Having stated the words of the statute *de donis*, let us see what the sense and practice of the legislature have been, where a peer, entitled either to a fee-simple or an entailed honour, has been attainted of felony.

*1ma pars paten. an. 37 H. 6. m. 20.*—It appears by that patent that *Thomas, Lord Dacre*, died seised of his barony in *fee simple*, and that *Joan*, the wife of Sir *Richard Fenys*, knight, was his heir; the king therefore declares him to be Lord *Dacre*. Lord Dacre's case.

King *Edward IV.* by his award, printed in *Collins's Claims 25*, awarded, that Sir *Richard Fenys*, in right of *Joan* his wife, and the heirs of her body lawfully begotten, be named and called the Lord *Dacre*, and have the same seat in parliament as *Thomas*, late Lord *Dacre*, had. [ 377 ]

The award of King *Edward IV.* could not change this fee-simple barony into an entail, because it was only under the privy seal; but if it had been made under the great seal, even that would not have been sufficient to destroy or prejudice the right which the descendants of *Thomas, Lord Dacre*, might claim to the fee-simple honour.

*Rot. parl. an. 1mo. Elix. n. 37.*—This therefore accounts for the act for restoring *Gregory Fenys*, esquire, brother and heir to *Thomas Fenys*, son and heir to Sir

*Thomas Fenys*, knight, late Lord *Dacre* of the south, and his heirs in blood, which was corrupted by the said Lord *Dacre's* being attainted of felony and murder in the 33d year of King *Henry VIII.*; for there would have been no occasion for that act if the honour had been entailed.

Lord Stourton's  
case.

*2da pars paten. an. 26 H. 6. m. 26*—Sir *John Stourton*, knight, was by patent created Lord *Stourton of Stourton*, to hold to him and the heirs male of his body issuing; and by the same patent the king granted to him several lands, &c. to hold to him and the heirs male of his body issuing.

*26 Feb. 3 & 4 P. & M.*—*Charles*, Lord *Stourton*, his descendant, was tried in *Westminster Hall* by his peers, before the Earl of *Arundell*, lord high steward *pro hac vice*, upon an indictment of felony and murder, and was attainted upon his own confession.

*23 Sep. 4 & 5 P. & M.*—By an inquisition, *post mortem*, it is found that the said *Charles*, Lord *Stourton*, was seised of the barony of *Stourton*, and several lands and tenements in tail male; and that he being so seised, had issue *John Stourton*, then Lord *Stourton*; and that the said *Charles*, Lord *Stourton*, was attainted of felony and murder as aforesaid, and on the 6th of *March* following his attainder, was hanged at *Salisbury*; and that on his death the barony of *Stourton*, and the said lands, &c. descended to the said *John*, then Lord *Stourton*, as son and heir male of the body of the said *Charles*. It is further found by the inquisition, that *Charles*, Lord *Stourton*, was at the time of the felony and murder committed, seised of the manor of *Stourton* in tail male; and that the reversion in fee-simple of the said manor escheated to the crown, by reason of his attainder. It is also found by the inquisition, that the said *Charles*, Lord *Stourton*, was at the time of his attainder seised in fee-simple of several other estates, and that thereby some of them came as escheats to the crown, and others to mesne lords, the Earl of *Pembroke*, and *Thomas Chaffin*, esquire, of whom they were respectively held.

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*9 Mar. 4 & 5 P. & M.*—King *Philip* and Queen *Mary* granted to *Anne*, Lady *Stourton*, the widow of the said *Charles*, Lord *Stourton*, the custody of the body and the marriage of the said *John*, Lord *Stourton*, and also an annuity of £40 issuing out of the lands in the hands of the crown, by reason of the minority of *John*,

Lord *Stourton*, to hold from the death of her husband, during the minority of the said *John*, Lord *Stourton*, in case the said *Anne* should so long live.

14 *pars paten. an. 15 Eliz.*—The queen, on the 16th of *February*, grants livery to *John*, Lord *Stourton*, son and next heir male of *Charles*, late Lord *Stourton*, deceased, of all honours, castles, manors, &c. of which the said *Charles*, late Lord *Stourton*, &c. died seised in fee-simple, or in tail.

In *D'Ewes's Journal*, 18 *Eliz.* fo. 228, there is this entry, *Friday, 11 February*, a writ was directed, and this day returned in common form, summoning the Lord *Stourton* to come to parliament.

In the *Journal Book of the House of Peers*, 11 *Feb. 18 Eliz.* there is the full entry: *Hodie returnatum fuit breve D'næ Reginæ quo Joh'es D'nus Stourton præ-sento parlamento interesse summonebatur, qui præsens admissus est ad suum sedendi in parlamento locum, salvo cuiq. suo jure.*

These are words of course, and used on the admission of all peers who take their seats by virtue of their ancestor's title; and though this Lord *Stourton* preserved his precedency next after the Lord *Lumley*, yet, upon a careful search made by Mr. *Rooke* among the records no new patent either of creation or precedency can be found.

7 *Mar. 18 Eliz.*—A bill was brought into the *House of Peers*, signed by the queen's own hand, and read three times that day, and sent to the *House of Commons*, for restitution in blood of *John*, Lord *Stourton*.

This bill met with opposition in the *House of Commons*, and they added a proviso to it, and returned it to the *Lords*, but they not agreeing to the amendment, the bill was dropped. *D'Ewes's Journal*, 206, 230, 232, 254, 258, 260 to 264. *Hakewil's Modus tenendi parliamentum*, 183.

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Search has been made for this bill, but it cannot be found; but it is apprehended that it only related to the fee simple lands, of which it is found by the inquisition *post mortem*, that *Charles*, Lord *Stourton*, died seised.

15 *Feb. 1 Ed. 6.*—*Edward*, Earl of *Hertford*, Viscount *Beauchamp*, was created Baron *Seymour*, to hold with his other honours to him, and the heirs male of his body, and of *Anne*, his then wife; and if he should die without such issue, that then *Edward Seymour*, the son of the said earl by *Catharine*, his first wife, and the heirs

Duke of Somerset's case.



male of the body of the said *Edward*, should enjoy the said title of Baron *Seymour*.

16 Feb. 1 *Ed. 6.*—The said *Edward*, Earl of *Hertford*, was created Duke of *Somerset* with the like limitations as in the former patent.

5 *Ed. 6.*—The Duke of *Somerset* was indicted and attainted of felony by his peers, and executed.

5 & 6 *Ed. 6.*—By act of parliament it is enacted, that the Duke of *Somerset* and his heirs, and his heirs male, begotten upon the body of the said Lady *Anne* for ever, should forfeit to the king, and be deprived from thenceforth for ever, as well of the names of Viscount *Beauchamp*, Earl of *Hertford*, and Duke of *Somerset*, and every of them, and of all other his and their honours, degrees, and dignities. The act then recites the attainder of the duke of felony, and enacts that it shall be good and effectual against him and his heirs.

7 *Ed. 6.*—By act of parliament upon the petition of Sir *Edward Seymour*, eldest son of the late Duke of *Somerset*, by *Catharine* his first wife, reciting the attainder of the duke, and the confirmation of it, and that Sir *Edward Seymour* was disabled to be his heir by reason of the corruption of blood; it therefore enacts, that Sir *Edward Seymour* should be restored, and enabled only in blood, as son and heir to the said late Duke of *Somerset*, and that Sir *Edward Seymour* and his heirs should be enabled to demand, hold, and enjoy all honours, castles, manors, &c. which at any time thereafter should come or descend from any collateral ancestor, as if the duke had not been attainted, and to make his pedigree as heir, as well to and from the late duke, as to any other person, as if the duke had not been attainted, the corruption of blood, or any act of parliament, or judgment concerning the attainder of the late duke notwithstanding.

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13 Jan. 1 *Elix.*—*Edward Seymour*, son of the late duke by the Lady *Anne*, was advanced to the titles of Lord *Beauchamp*, Earl of *Hertford*.

13 June, 16 *Car. 1.*—*William Seymour*, his grandson, was advanced to the title of Marquis of *Hertford*.

12 *Car. 2.*—By act of parliament it is enacted, that *William*, Marquis of *Hertford* (great grandson and heir male of the body of the said *Edward*, Duke of *Somerset*, by the said Lady *Anne*), and the heirs male of his body, and the heirs male of the bodies of the said duke and Lady *Anne*, should be restored to the honour, dignity,

and title of Duke of *Somerset*, as fully as the duke held the same by virtue of the said letters patent, and as fully as if the act 5 & 6 *Ed. 6.* had never been made, any thing *in the said act* notwithstanding.

The following observations naturally arise upon the three last mentioned acts.

1st. That there was no occasion for the act of 5 & 6 *Ed. 6.* to have enacted a forfeiture of the Duke of *Somerset's* honours, if the attainder of felony itself would have had that effect.

2dly. That the act of 7 *Ed. 6.* only restored Sir *Edward Seymour* in blood, so as to make him and his heirs capable of taking and enjoying any estate from any collateral ancestor, but it was silent as to the duke's honours, and had no operation upon them.

3dly. That the act 12 *Car. 2.*, restoring the Marquis of *Hertford* and his heirs male, and the heirs male of the duke by Lady *Anne*, to the title of Duke of *Somerset*, as fully as if the act 5 & 6 *Ed. 6.* had never been made, without reversing, or even taking notice of the attainder, seems to imply the sense of the legislature, that that honour was not affected by the attainder (a).

We now proceed to the opinion which has obtained among learned judges and lawyers as to this point.

It seems to be clear, that a local or territorial barony was a tenement within the letter and intent of the statute *de donis*, and though it was objected in *Nevil's* case in the second year of the reign of *James 1.* 7 *Coke*, 33. that the earldom of *Westmoreland*, created by patent 21 *R. 2.*, was not land or a tenement, but a dignity inherent in the blood of the donee, and could neither be aliened before or after issue, and therefore such cases of dignity were out of the mischief, words, and intention of the makers of the statute *de donis*; and the opinion in *Maxwell's* case in *Plowd. Com.* was cited, that the grant of a thing which does not concern lands or tenements, nor is exercisable in lands or tenements, as an annuity which is personal, was not within the statute *de donis*, yet it was resolved by all the judges of *England*, that a name of dignity might be

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(a) See Sir *Dudley Ryder's* report upon the claim of Sir *Edward Seymour* to the dukedom, upon the failure of the issue male of the first duke of *Somerset* by *Catharine Filol*, *Coxe MSS. Lincoln's Inn Library.*

entailed, for that case concerned lands, because the donor was by patent made Earl of *Westmoreland*.

Lord *Coke*, in his 1st Inst. 19 *b*, says that a name of dignity may be entailed within the statute of *Westm. 2*, as dukes, marquises, earls, viscounts, and barons, because they be named of some county, manor, town, or place.

But this notion that an honour must be from some place, does not seem to be well founded, and the contrary is held by Lord C. J. *Holt* (none of the other judges of the court dissenting), in the case of the *King v. Knollys*, *Trin. 6 W. & M. 2 Salk. 509, 510, Skin. 518, 519, 1 Lord Raym. 12, 13*.

In 12 Co. 81, Lord *Coke* reports that it was resolved by the two chief justices, the chief baron, the attorney and solicitor in the 9th of King *James the 1st*, that the king might erect any name of dignity which was not before, and for that reason the king might create a dignity by name of baronet, and create one to be a baronet, to him and his heirs male of his body issuing; and that it was also resolved, that if the king does not create him of some place, he shall not have an estate tail, but a fee simple conditional which shall be forfeited for felony, but if he create him a baronet of a place, then shall he have an estate tail within the statute of *Westm. 2*.

But Lord Chancellor *Nottingham*, in his excellent speech in the *House of Lords*, in the case of *Robert Villiers*, esq., claiming the title of Lord Viscount *Purbeck*, in *June 30, Ca. 2*, declares his opinion clearly, that all entailed honours, notwithstanding any corruption of blood, are preserved by the statute of *Westm. 2*, against all forfeitures for felony, though not against treason, without distinguishing whether those honours were in their creation from some certain place or not.

[ 382 ] Objection.—But here it may be objected, that the statute of *Westm. 2*, only provides remedy for such tenements as, according to the condition of the gift, ought to revert to the donor, and which would not merge upon their reverter, but would afterwards continue *in esse*, so as to be enjoyed by him.

Answer.—I admit that these honours (if they were not preserved from forfeiture by the statute) would revert to the crown as donor by way of extinguishment and cesser, and yet they may be as properly said to revert or return to the crown, as if they had continued *in esse* after their

reverter, because the crown would thereby acquire a right to revive them, and to grant them *de novo* to a worthy branch of the same or any other family, and so the intent of the statute would be fully answered.

Objection.—It may be also objected, that as an attainder of felony operates by corruption of blood, why should it not have the same effect upon an entailed honour created by patent, as upon a fee simple honour.

Answer.—To which I answer with my Lord *Hale*, 1 *H. H.* 356, that by the statute *de donis*, if tenant in tail is attainted of felony there is no corruption of blood wrought as to the issue in tail, because the very blood as well as the land is entailed, and this reason will equally hold to prevent corruption of blood of issue in tail in the present case of an honour; but where tenant in fee simple is attainted of felony, his blood is so corrupted that no one can derive a title by descent through that blood.

Objection.—But supposing that the statute *de donis* extends to such honours as are now in question, it may still be objected, that Lord *Ferrers* being attainted of felony and murder, hath forfeited the earldom and viscountship by a condition in law tacitly annexed to the estate of those honours, in the same manner as he would have done if he had been attainted of high treason, and the statute of 26 *H.* 8. had not been made, according to *Nevil's case*, 7 *Co.*

Answer.—To which I answer, that there is a material difference between an attainder of high treason and an attainder of felony, because in every indictment for treason, it must be expressly charged to be committed against the duties of the parties' allegiance, 1 *H. H.* 59. but no such charge is required or would be proper in an indictment for felony, and therefore an attainder of treason necessarily imports a breach of the tacit condition of allegiance, but an attainder of felony only imports a breach of the law in general, and where there is no breach of the tacit condition of allegiance, there cannot possibly be a forfeiture in respect of it.

Upon the whole, whatever might have been thought of this matter, if it had been quite new, yet after what has passed in parliament and elsewhere on occasion of the attainders of Lords *Dacre* and *Stourton*, and of the Duke of *Somerset* of felony, and after the opinion of the judges in *Nevil's case*, and the passages out of Lord *Coke's* works, which have been cited, I must take it to be settled

law that where nobility has been conferred and limited by the king's patent in tail from any place, it would be an estate tail within the protection of the statute of *Westm. 2, de donis*, and consequently the viscountship in the present case, being from a place, will not be forfeited by Earl *Ferrers's* attainder of felony.

And with all due deference to better judgment, I apprehend that though the earldom in the present case is not conferred by the patent from any place, yet it ought to have the protection of the statute *de donis* in the same manner as if some place had been expressed in the patent, and will no more be forfeited than the viscountship, otherwise this absurdity will plainly follow, that where two honours are conferred and limited in tail by one and the same patent, the one from a place and the other not; that which is from a place would be an estate tail within the protection of the statute *de donis*, and would not be forfeited by an attainder of felony, but that which is not from any place would be only a fee-simple conditional, and would be forfeited by an attainder of felony.

And I beg leave to repeat Lord *Nottingham's* opinion, that all entailed honours are within the protection of the statute *de donis*, and consequently, whether they are from a place or not, they are not forfeited by an attainder of felony.

Lord *Keeper* was so well satisfied that the attainder of *Lawrence Earl Ferrers* of felony and murder, did not affect his next brother *Washington Shirley's* right to the earldom, &c., that his lordship granted him his writ, and the rest of the lords concurred in opinion with Lord *Keeper*, or at least acquiesced under it; for he took the oaths and his scat in parliament as Earl *Ferrers*, on *Monday, 19 May, 1760*. So that this point is now settled by the highest authority.

*Judgment of Death as pronounced on Earl FERRERS  
by the Lord High Steward, (Lord HENLEY,) on the  
18th of April, 1760.*

LAWRENCE EARL FERRERS,

His Majesty, from his royal and equal regard to justice, and his steady attention to our constitution (which hath endeared him in a wonderful manner to the universal duty and affection of his subjects) hath commanded this inquiry to be made, upon the blood of a very ordinary subject, against your Lordship a peer of this realm. Your Lordship hath been arraigned; hath pleaded and put yourself on your peers, and they (whose judicature is founded and subsists in wisdom, honor and justice) have unanimously found your Lordship guilty of the felony and murder charged in the indictment.

It is usual, my Lord, for courts of justice, before they pronounce the dreadful sentence ordained by the law, to open to the prisoner the nature of the crime of which he is convicted; not in order to aggravate or afflict, but to awaken the mind to a due attention to, and consideration of the unhappy situation into which he hath brought himself.

My Lord, the crime of which your Lordship is found guilty, murder, is incapable of aggravation; and it is impossible but that during your Lordship's long confinement, you must have reflected upon it, represented to your mind in its deepest shades, and with all its train of dismal and detestable consequences.

As your Lordship hath received no benefit, so you can derive no consolation from that refuge you seemed almost ashamed to take under a pretended insanity; since it hath appeared to us all, from your cross examination of the King's witnesses, that you recollected the minutest circumstances of facts and conversations to which you and the witnesses only could be privy, with the exactness of a memory more than ordinarily sound: it is therefore as unnecessary as it would be painful to me, to dwell longer on a subject so black and dreadful.

It is with much more satisfaction that I can remind your Lordship, that though from the present tribunal

before which you now stand, you can receive nothing but strict and equal justice ; yet, you are soon to appear before an Almighty Judge, whose unfathomable wisdom is able, by means incomprehensible to our narrow capacities, to reconcile justice with mercy. But your Lordship's education must have informed you, and you are now to remember, that such beneficence is only to be obtained by deep contrition, sound, unfeigned, and substantial repentance.

Confined strictly, as your Lordship must be for the very short remainder of your life, according to the provision of the late act ; yet from the wisdom of the legislature, which, to prevent as much as possible this heinous and horrid crime of murder, hath added infamy to death, you will be still, if you please, entitled to converse and communicate with the ablest divines of the Protestant church, to whose pious care and consolation in fervent prayer and devotion, I most cordially recommend your Lordship.

Nothing remains for me but to pronounce the dreadful sentence of the law ; and the judgment of the law is, and this High Court doth award, That you, &c.

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2. All the cases where the court has entertained bills for establishing boundaries, have been where the soil itself was in question, or there

might have been a multiplicity of suits. Vol. i. p. 331

3. Commissions to fix boundaries of legal estates are not of course; there ought to be some equitable circumstance for the court to lay hold of. *Ib.*

*See* NEW TRIAL 1.

### C.

### CHAMPERTY.

Gift obtained from an heir at law ignorant of his rights, by one who undertook to support him in obtaining possession of his estate, set aside under the circumstances: also money having been advanced to him by a subscription from different persons, and among the rest from his attorney, to enable him to prosecute suits; and an absolute bond having been taken from him for double the sum lent, with a defeasance executed some days after, declaring that, if he did not recover the estate, or half of it, the bond was to be delivered up: held, that the transaction was unconscionable, savouring of champerty, and dangerous to public justice. *Strachan v. Brander.* i. 303

### CHAPEL OF EASE.

The incumbent of the mother-church has the right of nominating to

chapels of ease, and can only lose that right by agreement between patron, parson, and ordinary, and on a compensation made to him; and therefore, where a chapel was erected and endowed by a grant of lands from the lord and freeholders of a manor, and the right of nomination was given by the archbishop in his deed of consecration to the inhabitants, and the vicar of the mother-church declared at the time that he had no right to nominate, and the inhabitants had repaired and nominated for 90 years, yet it was held, that the vicar was entitled to nominate. *Dixon v. Metcalfe*. Vol. ii. p. 360

#### CHARGE.

Where lands were devised, subject to, and charged with a sum not exceeding 10,000*l.* which testator afterwards directed to be paid to charities, void by the statute: held, that the charge sunk for the benefit of the devisee. *Jackson v. Harlock*. *Ib.* 263

See ESCHEAT 2. INCUMBRANCE 1. 2.

#### CHARITABLE USES.

1. Conveyance to charitable uses, defective on account of the uses being limited to certain officers of a corporation, and not to the corporate body, aided under 43 *Eliz.*

c. 4. *Attorney-General v. Tancred*.

Vol. i. p. 10

2. Devise of lands to "the thirteen fellows of *Christ's*, and the fellows of *Gonville* and *Caius*, living at the testator's death," is a devise for the benefit of the whole body corporate, not of the particular fellows in their natural capacities, and valid under the exception in the statute of mortmain. *Attorney-General v. Tancred*. *Ib.* 10
3. The legislature intended by the exception in the statute of mortmain, to save devises for the benefit of particular members as well as of the whole body. *Ib.* 15
4. The legislature intended to accept such devises as were really and *bonâ fide* for the benefit of colleges, not those where the legal interest only passes to the college in trust for other charitable uses. *Ib.*
5. The exception only extends to colleges established at the time when the statute of mortmain was enacted. *Ib.* 16
6. Devise held to be void, being proved to be upon a secret trust for a charity; conveyances having been made by the devisees, and the trust declared, though they denied, by their answer, having made any promise. *Edwards v. Pike*. *Ib.* 267
7. Where *A.* by will executed before the statute of mortmain, directs *B.* to settle a freehold estate to pay

- a sum *not exceeding 100l. per ann.* in such manner and upon such trust, on such a part of the poorer people of a parish as he should think and find to be a most proper charity; and *B.* in pursuance thereof, by will executed after the statute, appoints a sum less than the 100l. *per ann.*: held, 1st, That the appointment is not void by the statute; and 2dly, That the amount to be appointed was discretionary in *B.*, and not to be increased under the 43 *Eliz.* to the whole amount given by the will of *A.* *Attorney-General v. Bradley.* Vol. i. p. 482
8. Devise by will, attested by three witnesses, to *A. B.* and *C.*, and the heirs of the survivor: the bill stated, that it was upon a secret trust for a charity declared by an instrument executed at the same time as the will, and attested by two witnesses only, which was admitted by the answer: held, that the devise was void under the statute of mortmain. *Boson v. Statham.* i. 508
9. Where testatrix devised her freehold and leasehold estates to trustees, which she directed them to sell, and buy ground, and erect an alms-house, and lay out the residue in land, and also gave the residue of her personal estate to the like uses; the devise of the freehold and leasehold being void under the

statute of mortmain, part of a decree at the Rolls, which declared that if the trustees could obtain the gift of a piece of ground, they might erect an alms-house (giving them two years to procure such gift), and also that they were entitled to have the assets marshalled so as to throw the debts, &c. on the leasehold, reversed on appeal by the Lord Chancellor. *Attorney-General v. Tyndall.*

Vol. ii. p. 207

10. Testator by will executed *previous* to the estate of 9 *Geo.* 2. devises his real estate and also his personal to be laid out in land for a charity; by a codicil *subsequent* to the statute not attested he confirms the will: held that it operates as a new will, and that the bequest of the personal estate is void. *Attorney-General v. Heartwell.*

ii. 234

11. Bequest of money to *build and endow* an hospital upon land not already in mortmain, held to be void under the stat. 9 *Geo.* 2. *Pelham v. Anderson.* ii. 296

#### CHOSE IN ACTION.

What amounts to a reduction of the wife's choses in action into possession. *Forbes v. Phipps.* i. 502.

#### CODICIL.

See RESIDUARY LEGATEE 1. CHARITABLE USES 10. MISTAKE 2.

**COLLATERAL LIMITATIONS.**

Covenant in marriage settlement, that the settlor would surrender certain copyholds which were intermixed with his freeholds, to be settled upon the issue of the marriage, with limitations to collateral branches of the family ; his eldest son, upon his marriage, covenants to suffer a recovery of the freehold (which was done), and to settle the copyhold (to which he was admitted in fee) ; upon a bill brought by a nephew of the first settlor, on failure of issue of that marriage, for a specific performance of the covenant, to surrender in favour of collaterals : held, that though the consideration of marriage extended to collaterals, yet that the son by the covenants on his marriage, and by his admission in fee, had taken the copyholds discharged of the specific limitations. *Hale v. Lamb.* Vol. ii. p. 292.

**COLLEGE.**

See CHARITABLE USES 2, 3, 4, 5

**COLONIES.**

See WILL 2, 3.

**COMMISSION.**

See PUBLIC POLICY 1. BOUNDARIES 3.

**COMMON RECOVERY.**

Where a father was tenant for life,  
VOL. II.

with remainder to his son in tail, who, on his marriage, by lease and release, conveys his estate to trustees in strict settlement ; and some time afterwards joins with his father in making a mortgage of the same estate, and suffers a recovery to the use of the mortgage : held, that the recovery shall notwithstanding enure first to the uses of the marriage settlement. *Cheney v. Hall.* Vol. ii. p. 357

See DEVISE 7.

**COMPOSITION.**

See TITHES 1. CHAPEL OF EASE 1,

**CONDITION.**

Bequest of an allowance to a feme covert on condition she lived apart from her husband, held the condition *contra bonos mores*, and void.

*Brown v. Peck.* i. 140

See FORFEITURE 1.

**CONDITIONAL LEGACY.**

1. Bequest of 30,000*l.* South Sea Annuities, to trustees, in trust, to pay the dividends to *A.* until an exchange of certain lands shall be made between him and *B.*, and then the capital to be equally divided between them. *B.* dies before the time limited by the will for making the exchange expires. Held, that *A.* is absolutely entitled to the

whole legacy. *Lowther v. Caven-  
dish.* Vol. i. p. 99

2. Where testator gave to his son for his life the interest of a mortgage upon an estate, of which he was tenant for life in remainder at testator's death, and also the furniture in certain houses, upon condition of his executing a release of all claims he might have upon testator's estate, and of his not contesting the will: though the son lived fourteen months after the father's death without executing a release, and upon his first hearing the will, had expressed his dissatisfaction, and an intention of filing a bill; yet the circumstance of his never having paid any part of the interest of the mortgage, his having entered into possession of the furniture, and exercised acts of ownership, together with certain expressions of assent in his letters, were held to be evidence of his acceptance. *Earl of Northumberland v. Marquis of Granby.*

i. 489

3. Legacy from *B.* to *A.* on condition that he notified to his executors his willingness to release his claims: held, that he had forfeited his right to it by filing a bill. *Vernon v. Bethell.* ii. 110

#### CONFIRMATION.

See PARENTAL INFLUENCE 1.

#### CONSENT TO MARRIAGE.

Marriage held to have been with consent, where *A.*, whose consent was necessary, agreed to the marriage, provided a proper settlement could be made, and referred to *B.* to prepare one, which was accordingly done; and though there was afterwards some altercation between *A.* and the proposed husband, who signified his intention of relinquishing his addresses, yet the consent having been obtained without misrepresentation, could not be retracted: otherwise if it had been obtained by deceit or fraud. *Merry v. Ryves.*

Vol. i. p. 1

#### CONSIDERATION.

See VOLUNTARY GIFT 1. FAMILY AGREEMENT 1. COLLATERAL LIMITATIONS 1.

#### CONTINGENT DEBT.

Covenant in marriage articles, that in case the wife should survive the husband, or he should leave any issue by her, his heirs, executors, and administrators, should raise 500*l.* &c.: held, upon a petition by the trustees to be admitted as creditors under a commission of bankrupt against the husband, that the debt was contingent, and not proveable, though a warrant of at-

torney to confess judgment had been granted previous to the bankruptcy, and judgment entered up. *Sed qu.?* *Ex parte Jacobs.*

Vol. i. p. 174

#### CONTINGENT REMAINDERS.

Contingent and executory estates, and possibilities accompanied with an interest, are devisable. *Moor v. Hawkins.* ii. 342

#### CONVERSION OF ESTATE.

Where part of an infant's real estate was settled in jointure upon her mother, who being distressed, and about to sell her interest, a petition was presented, and the infant, upon a reference to the Master, and under an order of court, purchased it: she afterwards attained twenty-one, received a year's rent, and died: held, that the purchase, though made during infancy, was to be considered as real estate. *Inwood v. Twyne.* ii. 148

#### COPYHOLD.

See **ADVANCEMENT** 1. **ELECTION** 2.

#### COPYRIGHT.

1. Upon a bill brought by the king's printer to restrain the defendant from the publication of certain acts of parliament, &c., to which the patentees for printing law books were

also defendants, the court refused to interfere between the contending patents, and therefore only restrained the defendant from printing at any other than a patent press. *Baskett v. Cunningham.*

Vol. ii. p. 137

2. Injunction obtained by the assignee of an author after the expiration of the two terms of years allowed by the statute of *Anne*, dissolved, the common law right of the author being so extremely doubtful. *Osborne v. Donaldson.* ii. 327

3. Injunction to restrain the printing of an unpublished MS., a copy of which had been by the representative of the author given to a person under whom defendant claimed, but not with the intention that he should publish it. *Duke of Queensbury v. Shebbeare.* ii. 329

#### CORPORATION.

See **CHARITABLE USES** 1, 2, 3.

#### COSTS.

See **RELATOR** 1.

#### COVENANTS.

Demurrer to a bill by a landlord for a specific performance of covenants, contained in a lease which had expired, to repair hedges and mansion-house, and also for an account of loppings and dung, cut or removed, by the tenant; allowed;



common covenants in husbandry not being the subject of equitable jurisdiction. *Rayner v. Stone*.

Vol. ii. p. 128

### CROSS BILL.

*See PRACTICE 5.*

### CROSS REMAINDERS.

Appointment to all and every the daughter and daughters of *A.* and the heirs of their body and bodies, and in default of such issue, over; there being only two daughters, and one of them dying under twenty-one without issue: held, that the surviving daughter was entitled, though there were no cross remainders. *Wright v. Lord Cadogan*. ii. 239

### CUSTOM OF LONDON.

Covenants in the marriage settlement of a freeman of the city of *London*, that the husband might dispose of the wife's share by will, and also that her executors would release and convey all her interest, &c. to the husband: held not to vary the general rule, that the children should be entitled to the benefit of a composition with the widow. *Knipe v. Thornton*. ii. 118

### D.

### DEBTS.

*See EXONERATION 1.*

### DECLARATION OF TRUST.

1. Though a use or trust must arise out of the original feoffment to uses, yet they need not be specifically created at the time of the execution of the deed. *Wright v. Lord Cadogan*. Vol. ii. p. 256
2. The statute of frauds has only imposed a form in declaring the use, the control of the use remains as it was before the statute, the absolute will and declared intent of the owner. *Wright v. Lord Cadogan*. Vol. ii. p. 257

*See PRIORITY 2.*

### DEFENDANT.

*See NOTICE 2.*

### DEPOSIT.

*See PRACTICE 2.*

### DESCENT.

- A.* having covenanted to settle lands of 100*l.* per ann. on his wife for life, devises certain premises of the value of 50*l.* and directs his executors to purchase land of sufficient value to make up the said estate

FOOL, and then devises all his real estates, not therein before devised to *A.* his eldest son, his heirs and assigns, but in case he should die without issue before twenty-one, over: held, that *A.* took by descent, and therefore, that the legatees were entitled to resort to the real estate for so much as should be exhausted in making up the estate devised to the wife. *Scott v. Scott.*

Vol. i. p. 458

#### DEVISE.

1. Devise to trustees to raise by mortgage, or lease, so much money as would pay testator's debts, and afterwards to permit *A.* to receive the rents and profits for his life, and, after his decease, to permit his eldest son and the issue male of such eldest son, to receive, &c. and, for want of issue of *A.*, to *B.*, in like manner; and for want of issue of both, or if their issue should die without issue, then over: held, a trust estate, and that *A.* took an estate tail. *Stanley v. Lennard.*

i. 87

2. Testator having both freehold and leasehold property, the leasehold was held to pass under a general devise, applicable to freehold, the intention of the testator being collected from the will, that it should pass under such devise. *Lowther v. Cavendish.*

i. 99

3. The same construction ought to be put upon words of limitation in cases of trusts and of legal estates, except where the limitations are imperfect, and something is left to be done by the trustees; and therefore a devise of a trust was held to be an estate tail, from the apparent intent of the testator, and the general words of the will, though there was a limitation to trustees to preserve contingent remainders, a reference to issue male living at the time of the decease of the devisee, a restriction of failure of issue male to the lifetime of persons *in esse*, and a limitation in fee annexed to the words "heirs of the body." *Wright v. Pearson.*

Vol. i. p. 119

4. Devise of testator's estate at *A.* to his eldest son and his heirs, and in default of such to the heirs of his other children; his estates at *B.* to the husbands of his two daughters in like manner: held, the former an estate tail, the latter a joint estate in fee. *Pickering v. Towers.*

i. 146

5. Devise of all testator's real estates wheresoever situate, lying, and being: held, not to include leaseholds as well as freeholds. *Whitaker v. Ambler.*

i. 151

6. Devise of land to trustees in trust to pay an annuity, and subject thereto in trust to *A.* for life; re-

- mainder to trustees to preserve, &c.; remainder to the heirs of the body of *A.*; remainder to testator's right heirs, and the residue of testator's personal estate to be laid out in land, and settled to the same uses: held, that *A.* was entitled to an estate tail in the lands to be purchased. *Austen v. Taylor.*  
Vol. i. p. 361
7. Devise of an estate at *A.* to *I. H.* for life, remainder to the issue male of *I. H.* and to his and their heirs, share and share alike; and for want of such issue, to the issue female of *I. H.*, and to her and their heirs, share and share alike; and for want of such issue, over: of an estate at *B.* to *I. H.* for life; remainder to the issue male of his body, and to their heirs; and for want of such issue, over; with a proviso to charge the premises for such person as would take next in remainder, in case *I. H.*, or his issue, alienate, &c.; *I. H.* had two daughters, and suffered a recovery of the estate at *B.*: held, that he took an estate tail, and that the proviso was repugnant to the estate. *King v. Burchell.* i. 424
8. Devise of premises to *A.* and the issue of his body, and for want of such issue, over; is an estate tail in *A.* *University of Oxford v. Clifton.* i. 473
9. Devise of the residue of the testator's real and personal estate to his executors in trust for *A.* till he should attain twenty-one, and then that the trust should cease: held, to give the whole beneficial estate to *A.* *Peat v. Powell.* Vol. i. p. 479
10. Devise of all my estate at *C.* *H.* to *A.* for life; remainder to *B.* & *C.* is a devise in fee to *B.* & *C.* *Price v. Gibson.* ii. 115
11. *A.* having agreed to purchase a real estate, the purchase-money for which exceeded the amount of his personal estate, by his will, made a few days afterwards, attested by three witnesses, as to all the worldly goods that it had pleased God to bless him with, gave and bequeathed to his wife and two sons, all his goods, cattle, chattels, personal estate, and effects whatsoever; and in case they died without issue, &c. gave the children's share of the personal estate and effects over: testator dying before the purchase could be completed: held that the agreement ought to be specifically performed; and that the words of the will, being insufficient to comprehend real estate, the estate ought to be conveyed to the eldest son and his heirs, &c. *Cave v. Cave.* ii. 139
12. Where testatrix by will directed a sum of money to be laid out in land, and settled, after some previous limitations, on her own right

heirs, and afterwards made a general residuary devise of all her real and personal estate: held, that upon the evident intent of the testatrix to exclude the residuary devisee, the heir at law was entitled to a remainder in fee in the lands to be purchased. *Robinson v. Knight.* Vol. ii. p. 155

13. The rule that a man cannot make his right heir a purchaser is confined to the estate of which he is seised. *Ib.* 159

14. By devise of all testator's goods and chattels in and about his dwelling-house and out-houses at A. at his death: held, that running horses passed. *Countess Gower v. Earl Gower.* ii. 201

See CONTINGENT REMAINDER 1.

DESCENT 1. INTEREST 2. LEGACY 1, 2, 3, 4, 5, 6. PERSONAL ESTATE 2, 3, 4, 5, 6, 7, 8. RESIDUARY LEGATEE 1.

DONATIO CAUSA MORTIS.

See SLAVE 1.

DOUBLE PORTIONS.

Vide SATISFACTION 1.

DOWER.

See ELECTION 3. JOINTURE 1.

E.

ELECTION.

1. Part of testator's estate being

in settlement he devised all his estates, &c. in general words: held, that there was not such an indication of his intention to dispose of that over which he had no power, as to induce a court to compel the devisee to elect. *Forrester v. Cotton.* Vol. i. p. 532

2. Testator possessed of freehold and copyhold not surrendered, of which latter his mansion-house was part, after certain legacies, devises all his real and personal estate to his wife for life; remainder to his heir at law: held, from an expression in his will, *if she should think proper to reside at his said mansion-house*, that the testator intended to devise his copyhold, and that the heir therefore ought to be put to his election. *Unett v. Wilkes.* ii. 187

3. Devise of an annuity to testator's wife during her widowhood, charged on his real estate: held, that she must elect to take either under the will, or her dower. *Arnold v. Kempstead.* ii. 236

See CONDITIONAL LEGACY 2.

EQUITY.

1. Nothing is looked upon in equity as done, but what *ought* to have been done, not what *might* have been done. *Burgess v. Wheate.*

i. 186, *per M. R.*

2. Equity as old as *Bracton*.

*Ib.* 194, *per eund.*

3. Where plaintiff has no right, defendant may hold till a better right appears. Vol. i. p. 213, *per eund.*
4. The arms of equity are at present very short against the prerogative. *Ib.* 256, *per C. S.*

See BOUNDARIES 3.

### EQUITY OF REDEMPTION.

1. The equity of redemption in this court is the fee simple of the land ; will descend, may be granted, devised, entailed, and barred by a common recovery : which proves that, in the consideration of this court, it is such an estate as there may be a seisin of. *Burgess v. Wheate.*  
i. 225, *per C. J.*
2. The principle that where two distinct estates are mortgaged for two distinct debts, a separate redemption cannot be decreed, operates as long as the equities of redemption remain united in the same person. *Willie v. Lugg.*

ii. 76

See MORTGAGOR AND MORTGAGEE

1, 2. 5. USES AND TRUSTS 6.

### ESCHEAT.

1. Right of escheat not founded on want of an heir, but of a tenant to perform the services. *Burgess v. Wheate.* i. 201, *per M. R.*
2. The crown takes an estate by forfeiture, subject to the engagements

and incumbrances of the person forfeiting. Vol. i. p. 203, *per eund.*

3. The opinion that the lord takes the escheat, subject to the trust, seems not warranted, though no opinion given upon it. *Ib.* *per eund.*
4. So far from the lord taking any benefit as heir or assignee, he is distinguished from both, and excluded from the privilege which the heir had by common law, and the assignee by statute.

*Ib.* 208, *per eund.*

5. For the purpose of binding the lord in escheat, deeds have been held good against him, that would have been void in other respects. *Burgess v. Wheate.*

i. 209, *per eund.*

6. Case of a purchase, and the money paid by the purchaser, who dies without heir before any conveyance: *M. R.* of opinion, that the lord could not pray a conveyance.

*Ib.* 211, *per eund.*

7. Though the lord is sometimes called *quasi hæres*, it is always to his prejudice, and never to his benefit. *Ib.* 208, *per eund.*

8. That land escheated should be subject to the trust, seems most consistent with the lord's right, whether it be considered as a reversion or a caducary possession.

*Ib.* 229, *per C. J.*

9. In freeholds the form of the lord's concurrence not being necessary,

- he is always considered as much bound as if he were a party to the deed of alienation which makes the trust; because the power which the tenant now has by law is equivalent to the lord's consent to the grant when it was a strict reversion. Vol. i. p. 232, *per eund.*
10. The legal right of escheat arises under the law of enfeoffment, by which the lord gave the land to the tenant and his heirs, under a tacit condition to revert, if he died without heirs. *Ib.* 241, *per C. S.*
11. The latitude given to the donee to hold to himself, his heirs and assigns, reduced the consideration of reverter to the single event of *defectum tenentis de jure*. *Burgess v. Wheate.* *Ib.* 242, *per eund.*
12. The law of escheat had no regard to the tenant's right to the land, but only to his right of seisin. *Ib.* 243, *per eund.*
13. The reason why there was no escheat on the death of *cestuy que use* in equity, was, that on such event no use remained, and consequently no grounds for the subpoena. *Ib.* 244, *per eund.*
14. Confiscations repugnant to the genius of a free country, and confined to the single case of a vacant possession. *Ib.* 253, *per eund.*
15. The escheat has no necessary but only a casual dependence upon the

old use, which may be determined, and no new one raised, and yet the lord have no claim to his escheat. Vol. i. p. 258, *per eund.*

See TRUST 1.

#### ESTATE FOR LIFE.

See PERPETUITY 1, 2. PERSONAL ESTATE 4.

#### ESTATE TAIL.

See DEVISE 1, 3, 4, 6, 7, 8. PERPETUITY 1, 2. PERSONAL ESTATE 2, 3, 5, 6, 7, 8.

#### EXECUTOR.

Where testator had directed that his executors should not be liable for each other's acts, one of them, who was in good credit at the time, having called in a mortgage, and received the money, sends round the assignment to his co-executors, who execute it, and sign a receipt: held, that as no part of the money had come to their hands, they should not be answerable. *Westley v. Clarke.* i. 357

#### EXECUTORY DEVISE.

See DESCENT 1. CONTINGENT REMAINDER 1.

#### EXONERATION.

Devise of real estate to testator's wife, her heirs and assigns, in trust,

by sale of so much and such part of the premises as should be necessary, to advance and raise so much money as would fully pay off and satisfy all his just debts and funeral expenses, and all the residue to her for life, remainder to testator's heirs on her body begotten. Testator gave to his uncle his tobacco-box, and the residue of his personal estate whatsoever to his wife for ever, and appointed her executrix: held, the personal estate not exonerated from the payment of debts. *Stephenson v. Heathcote*.

Vol. i. p. 38



F.

#### FAMILY AGREEMENTS.

The court will support contracts entered into to preserve the peace of families; and therefore, where a son upon his marriage joined with his father in resettling the estate, and by a memorandum executed at the same time, agreed to secure 500*l.* to each of his sisters: held, that there was sufficient consideration for the court to decree a specific performance of this agreement, an attempt to shew that it had been obtained by an undue exercise of parental influence having failed. *Wycherley v. Wycherley*.

ii. 175

See VOLUNTARY AGREEMENT 4.

#### FEME COVERT.

1. Court inclined to think that husband might release the orphanage share of wife. Vol. i. p. 64
2. Wife held to be entitled to a provision against the particular assignee of the husband, for valuable consideration of the whole of her equitable interest. *Earl of Salisbury v. Newton*. i. 370
3. Where a feme covert was entitled to one-sixth of the residue of a testator's estate upon a bill filed by another residuary legatee, to which she and her husband were defendants; a decree was made for sale of the estate and payment: held that her share vested absolutely in her husband by the decree, and though the defendants were creditors of the wife, yet that the court would interpose to take the money out of their hands. *Forbes v. Phipps*. Ib. 502
4. The equity of compelling the husband to make a settlement out of the wife's estate, does not survive to the children, but is personal to her. *Scriven v. Tapley*. ii. 337

See JOINTURE 1.

#### FEOFFMENT.

See DECLARATION OF TRUST 1.

#### FIRE.

See LESSOR AND LESSEE 1.

## FORFEITURE.

Clause of re-entry in a lease for three lives in case lessee or his executors, &c. should lease for more than seven years without licence, the third life being in possession, under his father's will and being his executor, leased for fourteen years: held, that it was no forfeiture, as he had not notice of the condition, and as the lease could not extend beyond the life of the lessor, it could not pass an interest for fourteen years certain. *Northcote v Duke*. Vol. ii. p. 319

## FORGERY.

See TRUSTEE 5, 6.

## FRAUD.

1. Sale declared to be made subject to the trusts of testator's will, where under a decree that his real estate (which was devised in strict settlement, subject to debts) should be sold, the sale had been effected by collusion, between the creditors and tenants for life. *Manaton v. Molesworth*. i. 18
  2. Fraudulent conveyance set aside as against a purchaser with notice, notwithstanding a great length of time which had elapsed since the original transaction. *Alden v. Gregory*. ii. 280
- See APPOINTMENT 1. CHAMPER-

TY 1. PUBLIC POLICY 1. RE-LEASE 1.

## G.

## GAMING TRANSACTION.

Issue directed to try whether an agreement to carry on an illegal game, and a contribution for that purpose, had been made or not. *Nash v. Ash*. Vol. i. p. 378

## GENERAL RELIEF.

See PRACTICE 3.

## GRANDCHILD.

1. Opinion given that the word *grandchildren* in a will, comprehends *great grandchildren*, unless the intention appears to the contrary: in the present case it was so held, on the ground of the testatrix having in another part of the will described a great granddaughter as a granddaughter. *Hussey v. Berkeley*. ii. 194
2. Widow of a grandson held not to be comprehended under the description of a granddaughter. *Ib.*

## H.

## HEIR AT LAW.

See DESCENT 1. DEVISE 12, 13.  
ELECTION 2. WILL 2, 3.



## HUSBANDRY.

See COVENANT 1.

## I.

## INCUMBENT.

See CHAPEL OF EASE 1.

## INCUMBRANCE.

1. *A.* created a trust for the payment of incumbrances out of the rents and profits of his real estate, part of which being subject to the arrears of a rent charge to the crown, discharged by a privy seal, provided 5000*l.* be paid to *B.* and *C.*, for securing which a term created by act of Parliament: held, that this was a debt affecting the estate, and not within the trusts of the deed, and therefore that the tenants for life must keep down the interest. *Earl of Peterborough v. Mordaunt.* Vol. i. p. 474
  2. Where heir inherits a mortgaged estate, if he executes a new covenant and bond, with a new equity of redemption, he makes the debt his own, and his personal estate shall be primarily liable. *Donisthorpe v. Porter.* ii. 162
- See CHARGE 1. ESCHEAT 2. REGISTRY 1.

## INFANT.

See CONVERSION OF ESTATE 1.  
JOINTURE 1.

## INFORMATION.

See RELATOR 1.

## INJUNCTION.

See COPYRIGHT 1, 2, 3. LESSOR AND LESSEE 1.

## INQUISITION.

An inquisition will not entitle the crown to seize where there is a legal title in possession. *Burgess v. Wheate.*

Vol. i. p. 188, *per M. R.*

## INSURANCE.

Satisfaction having been made, under a royal commission for distribution of prizes, to the insured, such of the insurers as had paid, held entitled to restitution though foreigners; but not those who had compounded and renounced salvage. *Blaauwpoel v. Da Costa.*

i. 130

See LESSOR AND LESSEE 1.

## INTEREST.

1. Interest refused upon a stale demand. *Merry v. Ryves.* i. 1
2. Devise to *A.* for life, with remainder to his first and other sons, remainder to his daughters; and, in default of such issue, the premises to stand charged with two sums, to be paid after the death of *A.*

without issue, and subject to such charge over, with a power to *A.* of jointuring the whole estate, which he executed, *A.* dying without issue, held that the sums only carried interest from the death of the jointress, who survived him.

*Reynolds v. Meyrick.* Vol. i. p. 48  
See MORTGAGOR AND MORTGAGEE  
1.

### INTRODUCTORY WORDS.

Effect of, in a will. ii. 145

### ISSUE.

See GAMING 1. NEW TRIAL 1.  
WILL 2, 3.

J.

### JOINT STOCK COMPANY.

See TRUSTEE 5, 6.

### JOINTURE.

1. Determinations of the Lord Chancellor, 1st, That the statute of 27 H. 8. which introduced jointures, extends to adult women only, infants not being particularly named: and therefore that, notwithstanding a jointure on an infant, she may waive the jointure, and elect to take dower. 2dly, That a covenant by the husband that his heirs, executors, or administrators, shall pay the wife an annuity for her life in full for her jointure, and in bar of dower, without expressing

that it shall be charged on any particular lands, or be secured out of lands generally, is not a good equitable jointure within the statute. 3dly, That a woman, being an infant, cannot, by any contract previous to her marriage, bar herself of a distributive share of her husband's personalty in case of his dying intestate: reversed on appeal by the House of Lords. *Drury v. Drury.* Vol. ii. p. 39  
*Earl of Buckinghamshire v. Drury.*

*Ib.* 60

2. Husband having a power to make a jointure of any part of the estate not exceeding 400*l.* *per annum*, covenants on his marriage to settle lands of the yearly value of 400*l.* clear of taxes and reprises; he afterwards makes a settlement of lands, with a covenant, that if they should fall short of 400*l.* *per annum*, he would make up the deficiency: held, that the settlement was intended as an execution of the power, and the making the jointure clear of taxes and reprises in the articles was a mistake. *Countess of Londonderry v. Wayne.*

ii. 170

3. Where lands of a specified annual value are settled in jointure pursuant to a power, the value is to be estimated at the death of the husband. *Ib.*

## JURISDICTION.

See PRACTICE 5.

## L.

## LACHES.

See SETTLEMENT 2.

## LAY IMPROPRIATOR.

See TITLES 1.

## LEASE.

See FORFEITURE 1. MISTAKE 1.

QUASI TENANT IN TAIL 1. RENEWAL 2.

## LEASEHOLD.

See DEVISE 4, 5. RENEWAL 2.

## LEGACY.

1. Bequest to the children of testator's daughter, to the number of four, of the sum of 1000*l.* each, if more, the 4000*l.* to be divided between such as should be living at testator's death; but, if his daughter should die without issue, then over; a child by another husband, born after testator's death, cannot take, and the bequest over is good, being not a limitation over, but an absolute legacy. *Salkeld v. Vernon*. Vol. i. p. 64

2. Residue of testator's estate directed to be invested in government

securities, and the interest paid to his wife, and after her death to be sold, and the money thereby arising to be divided amongst his daughters and grandchildren: held, that the share of a daughter dying in the lifetime of the wife, was vested. *Hatch v. Mills*.

Vol. i. p. 342

3. Residuary bequest to "the said *A. C.*" there being two persons of that name (*A. C.* of *St. I.* and *A. C.* of *H.*), both of whom were specific legatees: held, from the manifest intent of the testator, apparent on the face of the will, that the former was entitled. *For v. Collins*. ii. 107

4. Legacy to trustees to be put out upon security, the interest to be paid to *A.*, and in case he marry or die, the interest to be paid to *B.*, in trust for her till she came to the age of twenty-one years: held, that *B.* was absolutely entitled to the legacy. *Hule v. Beck*. ii. 229

5. Testator gives to his executor an annuity of 200*l.* charged on his real estate, and payable at certain specified periods; by a codicil, attested by two witnesses only, he gives him another annuity of 100*l.*, payable as mentioned in his will: held, that the executor was entitled to both, the latter annuity being

payable out of his personal estate.  
*Wright v. Lord Cadogan.*

Vol. ii. p. 239

6. Bequest of money in the funds to A. in trust for B. an infant, and for such younger son or sons as B. shall have, equally to be divided between them; and in case there shall be but one younger son, then the whole to him; held, that B. took only a life interest, subject to which his younger children took the whole. *Garden v. Pulleney.*

ii. 323

See ADEPTION 1. CONDITION 1.  
CONDITIONAL LEGACY 1, 2, 3.  
SATISFACTION 1.

#### LEGATEE.

1. Description of legatee, which it was doubtful whether it applied to mother or daughter, held from the construction to mean the former: extrinsic evidence admitted, but held to amount to nothing. *Hussey v. Berkeley.*

ii. 194

See LEGACY 3.

#### LENGTH OF TIME.

See FRAUD 2.

#### LESSOR AND LESSEE.

Whether lessee of a house, who is under covenants to repair, accidents by fire excepted, the house being burnt down, and lessor, who had insured, *having received the insurance money*, but neglecting to

rebuild, is entitled to an injunction till the house is rebuilt, against an action at law brought by the lessor for the rent, *quare?* *Camden v. Morton.* *Brown v. Quiller.*

Vol. ii. p. 219

#### LIEN.

Master being turned out of possession upon the vessel's being captured, does not deprive him of his lien for the freight in case of her recapture. *Ex parte Cheesman.*

H. 181

#### LIMITATION.

1. Limitation of a leasehold estate in a marriage settlement after the decease of husband and wife, in trust for such child and children as they should appoint; and in default of appointment, to all and every the child and children equally: held, to be a vested remainder, which opened to take in the issue, as they came *in esse*. *Lawrence v. Maggs.*
- i. 453.
2. Settlement after marriage of stock which had been the wife's property, in trust for the husband for life, then to the wife for life, and then to the heir male of the body of husband and wife, in default of such heir male, to the heirs female, &c. with a clause that, if the husband should settle lands of equal value to the like uses, the stock

should be re-assigned to him : a son being afterwards born, who died in the lifetime of the father, without issue, and under age: held, that the property vested in the father, and passed by his will. *Le Rousseau v. Rede.* Vol. ii. p. 1

#### LITERARY PROPERTY.

See COPYRIGHT 1, 2, 3.

#### LUNATIC.

See RELATOR 1.

#### M.

#### MANORS.

See BOUNDARIES 1.

#### MARRIAGE.

See CONDITION 1. CONSENT 1.  
REVOCATION 1.

#### MARSHALLING ASSETS.

See CHARITABLE USES 9.

#### MASTER OF VESSEL.

See LIEN 1.

#### MERCHANTS' ACCOUNTS.

Merchants' accounts, after six years total discontinuance, within the statute of limitations. *Martin v. Heathcote.* ii. 109

#### MERGER.

1. *A.* devises certain premises (subject to a mortgage of 3500*l.*) to his three daughters, to be divided equally; one dies; mortgagee bequeathes to the two survivors all the money due on the mortgage and the interest, so that it do not altogether exceed 4000*l.*, and if it do not amount to 4000*l.*, then to be made up: the other daughter dies, leaving all her real and personal estate to the third: held, that the charge is merged in the inheritance. *Price v. Gibson.*

Vol. ii. p. 115

2. Where a person is entitled to a sum of money charged upon an estate, and secured by a term of years, and afterwards becomes entitled to the fee-simple of the estate, a court of equity extinguishes the equitable lien, except in the case of creditors or of infancy. *Donisthorpe v. Porter.* ii. 162

#### MISREPRESENTATION.

See VOLUNTEER 4.

#### MISTAKE.

1. Where a lease had been granted with a covenant for renewal, and also the deputation of a keepership, with a memorandum to renew concurrently with the lease; and upon renewal, a few days before the ex-

piration of the term, the renewed deputation had been by mistake made for the residue of the old, instead of for the new term: held, that the mistake ought to be rectified; and though there was a covenant in the lease not to assign, yet as that covenant would not at law have prevented an underletting, the same relief was given to an under tenant as the original lessee would have been entitled to. *Jalabert v. Duke of Chandos*.

Vol. i. p. 372

2. Mistake in a will and codicil as to the amount of a fund out of which younger children were to be provided for, rectified on the evident intent of the testator. *Brackenbury v. Brackenbury*. ii. 275.

See NOTICE 3.

### MORTGAGOR AND MORTGAGEE.

1. Absolute conveyance, and a deed of defeasance, on payment of mortgage-money, during the joint lives of mortgagor and mortgagee, held a restraint upon mortgagor; and a redemption decreed, there being also fraudulent and oppressive conduct on the part of the mortgagee. *Spurgeon v. Collier*. i. 55
2. Conveyances held upon the circumstances and answer of defendant to be mortgages, and not absolute conveyances; and defendant having insisted upon their being absolute conveyances, plaintiffs were allowed to redeem with costs. *England v. Codrington*.  
Vol. i. p. 169
3. If mortgagor were to die without heirs, and mortgagee in possession were to come against the personal representatives for the money too, *M. R.* of opinion, that the court would compel him to re-convey, not to the lord by escheat, but to the personal representative. *Burgess v. Wheate*. Per *M. R.* i. 211
4. *A.* having granted a mortgage of anticipation to *B.* of a *West India* estate, being found upon an account taken to be greatly indebted to him, releases the equity of redemption to *B.* and his heirs; it not appearing, however, at the time to have been intended as an absolute sale, and *B.* having both by letter and in conversation stated himself as being only mortgagee in possession, a redemption was decreed. *Vernon v. Bethell*. ii. 110
5. Deed of mortgage at 5 per cent. contained a proviso that as often as the interest should be paid half yearly on the days appointed, or within three months next after each, so much should be deducted as would make the interest 3½ per cent. By a separate agreement, mortgagee covenanted not to call

in the money within five years, unless the interest should be in arrear. The first half year's interest not having been tendered till *after* the three months, but the second half year's interest *before*: held, first, that mortgagee was only entitled to interest at 5 *per cent.* for the half year which had been tendered after the time, and secondly, that in consequence of the default, he was entitled to call in his money. *Stanhope v. Manners.*

Vol. ii. p. 197

6. A prior incumbrancer not allowed to turn interest into principal by indorsement, as against a subsequent incumbrancer, of whom she had notice. *Digby v. Craggs.*

ii. 200

7. Mortgagee held, notwithstanding a recital in the declaration of trust, to have obtained a security to the extent of the interest of mortgagor in the premises. *Sheldon v. Cox.*

ii. 224

See EQUITY OF REDEMPTION 2.  
PRIORITY 1, 2. REGISTRY 1.  
REVOCATION 1.

#### MORTMAIN.

See CHARGE 1. CHARITABLE USES  
1, 2, 3, 4, 5, 6, 7.

#### MULTIPLICITY OF SUITS.

See BOUNDARIES 1.

#### N.

#### NATURAL SON.

See POWER 1.

#### NEW TRIAL.

New trials granted in issues directed to try the right of the soil, though the judge certified in favour of the verdict; as there was no precedent of a decree, where the inheritance would be bound, being made upon one verdict only. *Earl of Darlington v. Bowes.* Vol. i. p. 270.

#### NON DECIMANDO.

See TITHES 1.

#### NOTICE.

1. Covenant in a marriage settlement that the husband shall, within one year, execute, he being then under age, does not shew such an interest in him as to put a purchaser upon inquiry. *Howorth v. Deem.* i. 351
2. Proof of constructive notice by one witness not sufficient against a positive denial of notice by the answer. *Ib.*
3. Where in the office copy of a will a whole line of the original had been omitted, but the sense was left in such a manner as to give reason to suppose that the original

contained a limitation in tail of real estate: held, that this was sufficient to put a purchaser upon inquiry. *Surman v. Barlow*.

Vol. ii. p. 165

4. Notice to agent held to affect principals, and no difference in this case by his being owner of the estate. *Sheldon v. Cor.*

ii. 224

5. A purchaser is not bound to take notice of an equity arising out of the mere construction of words, which are uncertain, and the meaning of which often depends upon their locality. *Cordwell v. Mackrill*.

ii. 347

See BANKRUPTCY 1. PRIORITY 2.

## O.

### OPENING BIDDINGS.

See BIDDINGS.

### ORPHANAGE.

See BARON AND FEME 1.

## P.

### PARENTAL INFLUENCE.

1. A father having advanced a child in his infancy, upon his coming of age, takes a bond from him to a greater amount than the sums advanced; held, the bond obtained by parental influence, and decreed not to stand as a security for the

sums advanced, but to be set aside altogether.

2. Loose expression in a letter from the son held not to be a confirmation. *Carpenter v. Heriot*.

Vol. i. p. 338

See FAMILY AGREEMENT 1.

### PARENT AND CHILD.

See ADVANCEMENT 1. PARENTAL INFLUENCE 1.

### PAROL AGREEMENT.

See RESULTING TRUST 1. PERJURY 1.

### PAROL EVIDENCE.

1. Parol evidence of testator's intention to give his personal estate exempt from debts, rejected. *Stephenson v. Heathcote*. i. 38
2. Where land was paid for with the money of A. parol evidence to shew that the purchase was made on behalf of B. refused. *Bartlett v. Pickersgill*. i. 515

### PARTICEPS CRIMINIS.

Relief given to. ii. 190

### PARTITION.

Two tenants in common in tail of a copyhold estate (where the entail was barred by surrender) enter into an agreement for a partition,



and make cross surrenders of the parts allotted to each other; held, that they only barred a moiety of their respective estates, and that the agreement to divide cannot operate as a partition, particularly in the case of copyholds, as it was without the lord's privity; nor can a defendant, claiming under the entail, be compelled to substantiate the agreement. *Oakeley v. Smith*. Vol. i. p. 261

#### PATRON.

See CHAPEL OF EASE 1. TITHES 5.

#### PERJURY.

A defendant having been convicted on the evidence of plaintiff (among other witnesses), of perjury, in denying a parol agreement in his answer; leave for plaintiff to file a supplemental bill, in the nature of a bill of review, stating this conviction, refused. *Bartlett v. Pickersgill*. i. 515

#### PERPETUITY.

1. Testator devises his real estates to trustees, to several persons for life, with remainder to their first and other sons in tail male successively; but directs his trustees, upon the birth of every son of each tenant for life, to revoke the uses before limited to their respective sons in

tail male, and to limit the premises to such sons for their lives, with immediate remainders to the respective sons of such sons in tail male: held, that this clause of revocation and resettlement was void, as tending to a perpetuity, and being repugnant to the estate settled. *Duke of Marlborough v. Earl Godolphin*. Vol. i. p. 404

2. Power of alteration of estates tail as they were to come in *esse* into tenancies for life: held to be void. *Heath v. Heath*. ii. 330

#### PERSONAL ESTATE.

1. Court not to inquire into the amount of the personal estate, whether sufficient or not to pay testator's debts. i. 43
2. Bequest of the residue to his daughter, and her issue, and for want of such issue, over; the limitation over too remote, and therefore void. *Salkeld v. Vernon*. i. 64
3. Bequest of 100*l.* to A., to be improved till he should attain the age of twenty-one; and in case he should die before twenty-one or afterwards without issue, then the money to be equally divided between the testator's sons and daughter: held the limitation over too remote. *Gray v. Shawne*. i. 153
4. Testator devises leasehold premises to his executor, after pay-

ment of certain sums, to pay the rents to *A.* for life, and then that his natural daughter should have the same for her life; and in case she should die, leaving no lawful issue, he bequeathed the premises to his executors, to be sold for the purposes of the will: held the devise to the executors not too remote. *Taylor v. Clarke.*

Vol. ii. p. 202

5. Appointment by will of a sum of money to several persons upon the death of testatrix's son without issue, or without making any disposition by will or deed, held to be too remote and void. *Grey v. Montagu.* ii. 205

6. Bequest of money to testator's wife, and the issue of her body, and failing such issue to such of his heirs whom she should appoint by written will: held, that the subsequent words did not control the previous limitation, and therefore that a bequest over of the money was void, as being too remote. *Houston v. Ives.* ii. 216

7. Bequest of money to *A.* upon condition that he should pay an annuity to *B.* and in case he should die without issue, then to be equally divided amongst such of testatrix's nearest relations which should at that time be living: held, the bequest over was too remote. *Destouches v. Walker.* ii. 261

8. Bequest of personal estate to *A.* during his life, and if he has no heirs, then over: held, the bequest over was void, as being too remote. *Bodens v. Lord Galway.*

Vol. ii. p. 297

See CHARITABLE USES 1. EXONERATION 1. LIMITATION 2.

## PLAINTIFF AND DEFENDANT.

See PERJURY 1.

## PORTIONS.

1. Term to commence after the father's death, to raise portions for younger children, in such shares and proportions as he should appoint, for want of appointment, equally, to sons at twenty-one, to daughters at twenty-one or marriage, to be paid immediately after the decease of the father; with survivorship in case of the death of a child before its portion should become *due and payable*. The father died without making any appointment: held, the portions vested at twenty-one or marriage during his life. *Cholmondeley v. Meyrick.* i. 77

2. Sums of money appointed by deed and will to *A.* for life, and then for her daughters and younger sons, payable in such shares, &c. as she should appoint, &c. and in default, in trust for all her daughters and

younger sons in equal shares, to be paid at their respective ages of twenty-one years; and in case any of them die before his or her portion became payable to the survivors: held, that the portions vested in the children at twenty-one, during the lifetime of *A. Earl of Salisbury v. Lambe*.

Vol. i. p. 465

3. Covenant in marriage articles, that in case the father should happen to die leaving issue male, and one or more younger sons or daughter, to raise portions; if but one *then living* 1000*l.*, if two, 1200*l.*, if three 1500*l.*, to be paid at their respective ages of twenty-one, or marriage, in such proportions as the survivors of the father and mother should direct, in default of such direction, equally: held, that the share of a son who attained twenty-one was vested, though he died in the father's lifetime. *Rooke v. Rooke*.

ii. 7

4. Where portions were provided for daughters on failure of issue male, to be paid at twenty-one, or marriage, after the death of the survivor of the father or mother; the father having died, and there being an only daughter, who had attained twenty-one; it was held, from the clear indication of the intention to postpone the raising till after the death of the survivor,

that the portion should not be raised during the lifetime of the mother. *Verney v. Earl Verney*.

Vol. ii. p. 26

5. Exchequer annuities settled upon the husband and wife for their lives, and after their deaths for the children of the marriage in equal shares, to be assigned and made over to the children at their respective ages of twenty-one years, happening after the death of the survivor of the husband and wife: if any attained twenty-one in their lives, to be paid, assigned, and made over within three months after the death of the survivor, unless sooner directed; with a proviso for survivorship among the children, if any should die before their shares were payable, &c.; and another, that if there should be no child, or all should die before any of their shares should be payable, &c. as aforesaid, then for the husband and wife, and the survivor and executors, &c. of such survivor: there being only one child who attained twenty-one, but died in the life of the mother, who survived the husband: held, first at the *Rolls*, and afterwards by the Lord Chancellor, the son's executor, and not the mother's, was entitled to the annuities. *Reynons v. Jeffreys*.

ii. 365

See ADEMPMENT 1. MISTAKE 2.  
SATISFACTION 1.

### POSSESSION.

Effect of length of possession.  
Vol. i. p. 297

### POWER.

See APPOINTMENT 1, 2, 3, 4, 5.  
PERPETUITY 1, 2. BARON AND  
FEME 1.

### PLEA.

Plea of purchase from one having a  
reversionary estate, and conse-  
quently not in possession, over-  
ruled, because it did not set out  
how the person from whom the  
title was deduced became entitled.  
*Hughes v. Garth.* ii. 168  
See AWARD 1.

### PRACTICE.

1. An appeal or rehearing for costs  
only, allowed under particular cir-  
cumstances. *Comper v. Scott.* i. 17
2. An original and two supplemental  
bills considered but as one cause,  
and therefore but one deposit ne-  
cessary. *ib.*
3. Allowance of a debt in the mas-  
ter's report, which had been ob-  
tained by fraud, rectified, the pro-  
per mode of proceeding being by  
original bill, not by bill of review;  
and held that it was not necessary  
to pray specifically that the act of  
the court should be set aside, plain-

tiff having made a sufficient case  
to obtain that relief under the  
prayer for general relief. *Man-  
ton v. Molesworth.* Vol. i. p. 18

4. A bill of review, with matter come  
to the party's knowledge since the  
hearing, lies where the plaintiff in  
the bill has since the hearing dis-  
covered matter which would vary  
the decree; and where, if such  
matter was known to the other  
party, he was not in conscience  
obliged to have discovered it to  
the court. For if the matter was  
known to the other party, and  
such as in conscience he ought to  
have discovered, he obtains the de-  
cree by fraud, and it ought to be  
set aside by original bill. i. 25
5. Filing a cross bill prevents any  
objection to the jurisdiction.

i. 190

See RELATOR 1.

### PRESCRIPTION.

See TITHES 1.

### PRESUMPTION.

Doctrine respecting. i. 296

### PRIORITY.

1. Third mortgagee, having *pendente  
lite*, and after the first mortgagee  
had by his answer submitted (on  
payment of the money due to him)  
to assign to the plaintiff, the se-  
cond mortgagee, obtained an as-  
signment of the first mortgage,

decreed to be entitled to hold the estate against the second mortgagee till he should be paid what was due to him upon both, he having had no notice of the second mortgage when he advanced his money. *Belchier v. Butler*.

Vol. i. p. 523

2. The custody of the deeds creating a term, accompanied by a declaration of the trust of it in favour of a second incumbrancer without notice of the prior mortgage, held to give him an advantage over the first incumbrancer, which a court of equity would not deprive him of. *Stanhope v. Earl Verney*.

ii. 81

3. The person claiming under such second incumbrancer, upon purchasing the equity of redemption from the mortgagor, was held not to have relinquished such advantages by having covenanted to retain part of the purchase money to redeem the prior mortgage, as it was also agreed that he might use the money adversariously in case he could not adjust the matter amicably. *Stanhope v. Earl Verney*.

ii. 81

#### PUBLIC POLICY.

Money advanced by plaintiff to the defendant to procure him a commission in the marines, decreed to be refunded with interest, plaintiff

having, after six months, been discovered to have worn a livery, and being thereupon discharged: first upon grounds of public policy, and secondly, as plaintiff had been imposed upon, defendant knowing that he was incapable of holding the commission. *Morris v. M'Culloch*.

Vol. ii. p. 190

See SPIRITUAL ASCENDANCY 1.

#### PURCHASER.

See BANKRUPTCY 1. PLEA 1.

#### Q.

#### QUASI TENANT IN TAIL.

Quasi tenant in tail of a freehold lease for lives may, by surrendering the old lease, and taking a new one to himself, bar the remainders over. *Gray v. Mannock*. ii. 339

#### R.

#### REGISTRY.

1. Where premises had been sold under a decree, held that the lien of an incumbrancer was not transferred to the purchase-money, so as to be out of the registry act; and he was therefore postponed to subsequent incumbrancers. *Hennand v. Moore*. i. 327
2. Notice of an unregistered mortgage held to affect subsequent mortgagees, who had registered. *Sheldon v. Cox*. ii. 224

**RELATOR.**

In an information at the relation of a lunatic, a proper relator was directed to be appointed, who might be responsible for costs of the suit. *Attorney-General v. Tyler.*  
Vol. ii. p. 230

**RELEASE.**

A release, *ex vi termini*, imports a knowledge in the releasor of what he releases, and, therefore, where executors (who had taken the opinion of counsel, which they had not communicated) obtained a release of the orphanage share from the husband of a freeman's daughter, they were decreed to account that the parties might elect, the length of time and alleged loss of vouchers being no sufficient bar to such account. *Salkeld v. Vernon.* i. 64

See VOLUNTEER 4.

**REMAINDER-MAN.**

A party who is plaintiff, has no right, in order to clear his own title, to bring remainder-men before the court, upon a discussion whether a prior remainder-men has title or not; and therefore a bill as against them dismissed. *Pelham v. Gregory.* i. 518

**RENEWAL.**

1. Bill for a specific performance of a covenant for renewal dismissed, it being either a covenant for perpetual renewal, and if so, obtained without consideration from the lessor, or else founded upon a mistake; but there being no proof of its having been improperly obtained, a cross bill to have it declared void was dismissed with costs. *Redshaw v. Bedford Level Company.* Vol. i. p. 346
2. Where a leasehold estate for lives was settled upon the husband for life; remainder to the wife for life, with remainders to the children, the husband having renewed by putting in the wife's life, is to be considered as a creditor upon the estate for the fine and charges of renewal. *Lawrence v. Maggs.* i. 453

**RENT.**

See LESSOR AND LESSEE 1.

**REPUBLICATION.**

See CHARITABLE USES 10.

**REPUTED OWNER.**

See BANKRUPTCY 2.

**RESIDUARY LEGATEE.**

Testator gives the residue of his personal estate to his three children,

*A. B. and C. share and share alike, as tenants in common, and not as joint tenants; but by a codicil revokes C. from being one of his residuary legatees, and gives her a pecuniary legacy instead: held, that this third does not belong to the two other residuary legatees, but shall go according to the statute of distributions. Creswell v. Chesslyn. Vol. ii. p. 123*  
*See DEVISE 9.*

#### REVOCATION.

Testator devises real and personal estate to certain uses, and afterwards by deed conveys it to the same uses until marriage, and then to new uses; providing for his intended wife, and the issue of the marriage: after the deed, and before marriage, by codicil attested by three witnesses, and directed to be annexed to his will, he imposes a forfeiture in case of his wife being disturbed; and after the codicil, marries: held, that the settlement revokes the will, which is republished by the codicil; that the new uses springing on the marriage do not revoke the codicil, nor the marriage, as being contemplated by the will. *Jackson v. Hurlock.* ii. 263

#### RUNNING HORSES.

*See DEVISE 11.*

#### S.

#### SALE.

*See APPOINTMENT 3. BIDDINGS 1.*

#### SATISFACTION.

*A. upon his second marriage, settles land to raise 5000*l.* for the children of the marriage: having four children by that marriage, he, by his will, in which he takes no notice of the settlement, gives 1000*l.* to each of them as his and her portion: held, that they were not entitled to portions under both instruments, and that as they had accepted the provision by the will, they were bound by such acceptance. Byde v. Byde. Vol. ii. p. 19*

#### SATISFIED TERM.

*See PRIORITY 2.*

#### SECRET TRUST.

*See CHARITABLE USES 6. 8.*

#### SEISIN.

*See EQUITY OF REDEMPTION 1. ESCHEAT 12.*

#### SETTLEMENT.

1. Settlement after marriage, held voluntarily, proof of its having been made in pursuance of a parol promise before marriage failing, and

court of opinion, that even if such promise had been proved to have existed, it would not have supported a settlement made after marriage. *Spurgeon v. Collier*.

Vol. i. p. 55

2. Where a mother who was tenant for life with remainder to her son in fee, who was under age, covenanted, on his marriage, that they would settle, within two years, an estate on the heirs male of the marriage; bill, for a specific performance, by decreeing a strict settlement, dismissed: and even if it had appeared that there had been a sufficient covenant for that purpose, a great length of time having elapsed, and none of the parties having asserted their rights, the court would not have interfered. *Howorth v. Deem*. i. 351

3. The court will, from the general frame of a settlement, collect the intent contrary to the express words of a particular clause, and therefore where an estate in *N.*, part of the general estate, was, in default of issue male of that marriage, limited to the first and other daughters, and terms were created of the whole estate, to raise portions for daughters, payable at certain times, and in certain events; and in case there was no issue male of that marriage, such portions were directed to be augmented; with a proviso, that in

case any daughter should be entitled to the estate in *N.*, before the portion appointed for her *should be to be paid*, then her portion should cease, and not be paid: there being an only daughter, and the father having died without issue male after her portion was vested, held, that she ought to be considered as an eldest son, and that she was not entitled to the augmented portion, though the estate vested *after* it became payable. *Earl of Northumberland v. Earl of Egremont*.

Vol. i. p. 435

4. Where articles were entered into previous to marriage, for settling by the wife's father lands to the use of the husband and wife for their lives, and the life of the survivor, and after the death of the survivor, to the use of the heirs of the body of the husband on the wife, remainder over; and a settlement was made after the marriage reciting the articles, and said to be made in pursuance of the marriage; upon a bill brought by a son of the marriage, the court refused to decree the articles to be carried into execution by a strict settlement against a purchaser for a valuable consideration, who had notice of them, on the ground of the articles not being produced, by which alone the court could alter the settlement. *Cordwell v. Mackrill*. ii. 344



## SLAVE.

Bill by the administrator of the deceased for an account of personal estate given by her as a *donatio causâ mortis* to a negro who had been brought to *England* as a slave, dismissed with costs. *Shanley v. Harvey*. Vol. ii. p. 126

## SPECIFIC PERFORMANCE.

1. An undertaking contained in a letter from *A.* devisee of real estate to *B.* a legatee, to pay interest upon her legacy, which was charged upon the estate according to the rate fixed by an order of court, provided *B.* would join in a sale, held to be upon sufficient consideration, it appearing that several expensive suits, in which *A.* was engaged would thereby be terminated, and the estate bettered; and such undertaking not being waived by no notice having been taken of it in a subsequent agreement to sell, a specific performance was decreed. *Griffith v. Sheffield*. i. 73
2. Specific performance of marriage articles refused, on the ground of their being inconsistent, uncertain, and unintelligible. *Franks v. Martin*. i. 309

See COVENANTS 1. SETTLEMENT 2.

## SPIRITUAL ASCENDANCY.

Grant of an annuity fraudulently ob-

tained by a person having a spiritual ascendancy over a woman, who was under a state of religious delusion, set aside upon principles of public policy. *Norton v. Relly*. Vol. ii. p. 286

## SPIRITUAL COURT.

Courts of law and equity supervise the acts of the spiritual court, when they are incidental to their own determinations, and therefore if they prove an act *inter vivos*, they will consider it as void, and *coram non judice*, as much as if that court had proved a will relative to lands only. *Pigott v. Janson*. i. 469  
See WILL 1.

## SPRINGING USE.

1. It is a certain rule of law, that if such a construction can be put upon a limitation as that it may take effect by way of remainder, it shall never take place as a springing use or executory devise; and therefore a limitation in a settlement "to trustees to the use of *A.* the settlor for life, remainder to *B.*, his intended wife, for life, (except as thereafter excepted,) remainder to the heirs of the body of *A.*, begotten on *B.*, remainder to *A.* and his heirs, with a proviso, that if *A.* should die, and leave such issue as aforesaid, without making any provision for such

child or children in his lifetime, the said trustees should stand seised of one moiety, from and after the decease of A., to the use of such child," held a contingent remainder, and not a springing use, and therefore barred by a fine levied by A. and B. *Carwardine v. Carwardine*. Vol. i. p. 27

2. No case of a springing use ever introduced in the middle of a limitation, but it always comes in afterwards, and determines the first gift in fee: and whenever it happens to arise, it displaces the first gift, and changes the uses in favour of other persons. *Ib.* 34

#### STATUTE.

See ACT OF PARLIAMENT.

#### STOPPAGE IN TRANSITU.

Where consignee becomes insolvent, consignor has a right to stop the goods at any time before they come to his hands. *D'Aquila v. Lambert*. ii. 75

#### SUBPOENA.

See ESCHEAT 13.

#### SUPPLEMENTAL BILL.

See PERJURY 1. PRACTICE 2.

#### T.

#### TAXES.

See JOINTURE 2.

#### TENANT FOR LIFE.

See RENEWAL 2. PERPETUITY 1, 2.  
TITLE DEEDS 1.

#### TENANT IN COMMON.

See PARTITION 1.

#### TENANT IN TAIL.

See DEVISE 4.

#### TIMBER.

See TRUSTEE 7.

#### TITHES.

1. There cannot be prescription in *non decimando* against a lay impropriator; but it is not necessary to produce the deed of severance, it is sufficient to shew that it existed; and therefore where defendant, and those under whom he claimed, had been upwards of one hundred and thirty years in the *pernancy* of the tithes, a bill by impropriator was dismissed. *Fanshaw v. Rotherham*. Vol. i. p. 276
2. At common law, no man could avail himself of a discharge from tithes by grant, but by producing it. *Ib.* 295
3. The statute of H. 8. is silent as to the manner in which a person must make out his right to tithes against the church or patentees standing in the place of the church; and only provides for the assur-

ance and recovery of them, like temporal possessions in the king's court. Vol. i. p. 296

4. Whether a tithe be great or small is determined by the nature of it, and not by the mode of cultivation, or the use to which it is applied: and therefore the tithes of beans and pease, though gathered green by the hand for the food of man, are great tithe, and included under the term *decimæ garbarum*. *Sims v. Bennett*. i. 382
5. Where an agreement having been made between the rector and inhabitants of a parish, allotting lands in lieu of the ancient glebe, with some addition, in consequence of the rector's losing certain rights of common by inclosure, and also providing an annual pecuniary compensation in lieu of tithes, which upon the successor's declining to abide by, an amicable suit was instituted in this court, to which the ordinary (but not the patron, who was the king,) was made a party, and the parishioners agreeing to increase the stipend, a decree was made by consent to ratify the articles: held that this agreement, though acquiesced under for eighty years (forty of which, however, the rector against whom the decree was made had remained incumbent,) was not binding as to the pecuniary composition, the patron

not having been a party, and the composition having been made only with regard to the past, and not to the future increasing value of the tithes. *Attorney-General v. Cholmley*. Vol. ii. p. 303

#### TITLE-DEEDS.

Title-deeds delivered out of court to tenant for life, except when brought into court under an order for safe custody. *Webb v. Lord Lyminster*. i. 8

#### TRUST.

See APPOINTMENT 5. USES AND TRUSTS.

#### TRUSTEE.

1. Trustees lending money on personal security, is not of itself such gross neglect as to amount to a breach of trust, and the legatee, and afterwards his assignee, having acquiesced in such loan, a bill to charge the trustees was dismissed. *Harden v. Parsons*. i. 145
2. Trustee can transmit no benefit but his duty to hold for the benefit of all who would have been entitled if the limitation had not been by way of trust. *Burgess v. Wheate*. i. 227, per C. J.
3. A trustee cannot by delaying a conveyance, create a benefit for himself. *Burgess v. Wheate*. i. 238, per eund.

4. The transmutation of possession to a trustee conveys to him the legal burthens, and invests him with the legal privileges.

Vol. i. p. 251, *per* C. S.

5. A joint stock company having permitted a transfer of stock under a forged letter of attorney: held that the company, and not the fair purchaser, should bear the loss.

*Ashby v. Blackwell.* ii. 299

6. A trustee, whether a private person or body corporate, must see to the reality of the authority empowering him to dispose of the trust money; for if forged, it is in consideration of law and equity a nullity, and the right remains as before.

*Ib.* 302

7. Power contained in a will for the devisees for life, when in possession, to cut down timber, as four trustees, or the survivors or survivor of them should assign, allow of, or direct, all the four trustees being dead: held, that the court would execute the trust by referring it to a master to see what timber was fit to be cut down from time to time.

*Hewett v. Hewett.*

ii. 332

See ATTORNEY AND CLIENT 1.

### TRUST EXECUTORY.

1. Where the assistance of the trustees is necessary to complete a limitation, it is sufficient evidence

of the testator's intent, that the court should model the limitations, but where they are already declared, the court has no authority to alter them. *Austen v. Taylor.*

Vol. i. p. 368

2. Devise to trustees of money to be laid out in land, and to be settled as counsel should advise, in trust for A. and his issue in tail male to take in succession and priority, and the interest of the money till laid out to be paid to A., his sons, and issue: held, that A. should only have an estate for life in the lands to be purchased, with remainder to his first and other sons, &c.

*White v. Carter.*

ii. 366

### U.

### USES AND TRUSTS.

1. No instance where equity has considered an estate as not executed at the same time that law would have considered it as executed.

i. 35

2. Limitation to trustees to stand seised, and receive rents and profits to the use of A. is an estate executed in A.

*Ib.* 36

3. A. being seised in fee *ex parte paterna*, conveys to trustees, in trust for herself, her heirs and assigns, to the intent that she should appoint, &c. and for no other use, intent, or purpose whatsoever: A.

dying without appointment, and without heirs *ex parte paternā*: held, *per Lord Keeper*, and the *Master of the Rolls*, 1st, that the maternal heir was not entitled; 2dly, that, there being a *terre-tenant*, the crown, claiming by escheat, had not a title by *subpœna* to compel a conveyance from the trustee, the trust being absolutely determined; no opinion being given upon the right of the trustee: *per Lord Mansfield*, C. J. 1st, that the heir *ex parte maternā* was not entitled: 2dly, that, from the analogy between trusts and legal estates, the crown was entitled by escheat, but that, if the conveyance had barred the crown of its right, as between the maternal heir and the trustee, the former was entitled. *Burgess v. Wheate*.

Vol. i. p. 179

4. When once a trust became the object of equity, the same governing principles were observed in trusts as before in uses.

*Ib.* 194, *per M. R.*

5. The analogy between uses and trusts must be confined to those cases where they are considered as distinct from the legal estate, in other cases they both fall within the rules of law.

*Ib.* 195, *per eund.*

6. Crown at law not entitled in case of a use, and according to the

analogy between trusts in equity, and uses at law, not entitled to a trust in equity. *Burgess v. Wheate*.

Vol. i. p. 199, *per eund.*

7. A trust is collateral to the land, and created by contract of the party, and therefore one who comes in in the *post* shall not be liable to it: but an equity of redemption is inherent in the land, and binds all persons in the *post* or otherwise.

i. 205, *per eund.*

8. Trust of the legal estate can only be co-extensive with the legal estate.

*Ib.* *per eund.*

9. A trust cannot be executed where no intent appears to create it, except by operation of law; and cannot result by operation of law but for those for whom it might have been declared by the party creating it.

*Ib.* 209, *per eund.*

10. The opposition between uses and trusts does not consist in any material difference in the essence of the things themselves, but in the difference of the practice of the court of *Chancery*.

*Ib.* 217, *per C. J.*

11. That part of the old law of uses which did not allow any relief to be given for or against estates in the *post*, does not now bind by its authority in the case of trusts.

*Ib.* *per eund.*

12. Where a court of justice takes cognizance, and compels the exe-

cution of trusts in substantial ownership, the trust becomes the mere form of a legal conveyance.

Vol. i. p. 218, *per eund.*

13. In the case of uses before the statute where the confidence was to an intent that could not be executed, it never was settled what should be done with the estate.

i. 219, *per eund.*

14. The *forum* where they are adjudged, the only difference between trusts and legal estates.

*Ib.* 223, *per eund.*

15. *Cestuy que trust* actually and absolutely seised of the freehold in consideration of this court, and therefore the legal consequence of an actual seisin of the freehold shall follow for the benefit of one in the *post.* *Ib.* 226, *per eund.*

16. Limitation of a trust to the lord, failing the heirs of *cestuy que trust*, would have been good, because such a limitation would have been good at law, and is implied in the conveyance of every legal fee.

*Ib.* 237, *per eund.*

17. The difference between uses and trusts does not consist in the principles and rules applied to them, but in the extent of the application of those principles and rules.

*Ib.* 248, *per C. S.*

18. It is too much to say, that because trusts are considered as imitating the possession, that there-

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fore the creation and instrument of trust is a nullity.

Vol. i. p. 250, *per eund.*

19. The creation of a trust cannot affect the right of a third person.

*Ib.* 251, *per eund.*

See DECLARATION OF TRUST 1.  
TRUSTEE 2, 3, 4. TRUST EXECUTORY 1.

### USURY.

*A.* agrees to lend *B.* 1000*l.*, and for that purpose sells 1000*l.* stock, which being under *par*, produces only 923*l.*: he afterwards lends a further sum of 1400*l.*, part of which being sold out in like manner, produces only 1132*l.* 5*s.*, and takes mortgages for the two sums at 5 *per cent.*; in the former case, with a covenant to reduce the interest to 4 *per cent.* if paid within one year; in the latter case, with a power to the borrower to replace the stock within two years. On a bill brought by *A.* for a foreclosure, the whole money having been allowed in the account by the master, held, the transaction was usurious, and that equity would relieve though the money had been paid. *Moore v. Battie.* i. 273

### V.

### VESTING.

See LEGACY 1. PORTIONS 1, 2, 3.

F F

## VICAR.

See CHAPEL OF EASE 1.

## VOLUNTARY AGREEMENT.

Court in general will not decree performance of. Vol. ii. p. 176

## VOLUNTARY GIFT.

1. Executor advances sums of money to his daughters *pendente lite*, to two of them on their marriage, to the others as a voluntary gift, and afterwards dies insolvent, having received assets; on a bill by the legatees, the voluntary gifts were considered fraudulent, but those daughters being also legatees, they were permitted to retain in part of their legacies, subject to abatement. *Partridge v. Gopp.*

i. 163

2. No man has so absolute a power over his own property, as that he can alienate it when such alienation tends to delay, hinder, or defraud his creditors, unless it be made on good consideration, and *bonâ fide*.

*Ib.* 167

3. By the 13 *Eliz.* the only consideration as to the validity or invalidity of alienations, depends on the intent and conduct of the party making them, and not on the motive with which they are received. *Ib.*
4. Volunteers are, by the statute, made responsible to the creditors

of the giver, though not to the giver himself. Vol. i. p. 168

5. Release from one brother to another of certain premises that had been devised to him by his father, executed in consequence of a threat to file a bill, and of assurances that a favourable opinion had been given by counsel, set aside in favour of creditors. *Peat v. Powell.*  
*Ib.* 479

See SETTLEMENT 1.

## W.

## WILL.

1. Testator having bequeathed his personal estate to his wife, with a contingent disposition to any child she might be enceinte with, by an instrument executed in the *East Indies* during his last illness, empowers *A.* and *B.* to invest any gold dust, &c. which he had in bottomry, &c. as they should think most advantageous, and deliver the same over to his wife, or her assigns, she running all risk: held, that this instrument, though it had been proved in the ecclesiastical court, was merely an act *inter vivos*, and not a revocation of the will. *Pigott v. Janson.*  
*Ib.* 469
2. Bill by an heir at law, for an issue to try the validity of a will made in *England*, dismissed, partly on the

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ground of his acquiescence, both in the ecclesiastical court, and upon a bill to perpetuate testimony, but principally because the lands lay in <i>Pennsylvania</i> . <i>Pike v. Hoare</i> . Vol. ii. p. 182	3. A will of lands lying in the co- lonies is not triable in <i>Westminster</i> <i>Hall</i> . Vol. ii. p. 184 See RESIDUARY LEGATEE 1. RE- VOCATION 1. SPIRITUAL COURT 1.
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THE END.











